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Vol. 1

TRANSCRIPT OF RECORD

(Pages 1 to 106)

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 14, 1950.

CERTIORARI GRANTED OCTOBER 22, 1951.

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Appellants.

Statement Under Rule 15 (b).

In the case of the *United States* v. *William Z. Foster et al.*, C 128-87 et al., tried before Hon. Harold R. Medina and a jury in the District Court for the Southern District of New York, the appellant Eugene Dennis was attorney pro se, and the appellants Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe and Abraham J. Isserman were attorneys for various individual defendants who there stood trial.

On the 14th day of October, 1949, after the jury had rendered its verdict in the above-described case of *William Z. Foster, et al.*, C 128-87 et al., and after the Trial Judge had discharged the jury, he adjudicated the appellants to be guilty of criminal contempts which the Court found had been committed during the trial. Thereupon he sentenced the said appellants.

Statement Under Rule 15(b).

On the 14th day of October, 1949 Judge Medina filed a contempt certificate pursuant to Rule 42 (a) of the Federal Rules on Criminal Procedure.

On the said 14th day of October, 1949 Judge Medina signed and filed orders of contempt as to each of the appellants as follows:

"Eugene Dennis adjudged guilty of contempt of court as specified in Specifications I, XIX, XXII, XXXI, XL of Contempt Certificate and sentenced to Six Months on each contempt to run concurrently, and to be committed to custody of the Atty. Genl. or his authorized representative for imprisonment on Nov. 15, 1949.

"Louis F. McCabe adjudged guilty of contempt of court as specified in Specifications I, VI, VII, VIII, IX, XXVII of Contempt Certificate and sentenced to Thirty Days on each contempt to run concurrently, and to be committed to custody of the Atty. Genl. or his authorized representative for imprisonment on Nov. 15, 1949.

"Abraham J. Isserman adjudged guilty of contempt of court as specified in Specifications I, VI, VII, XII, XXVII, XXXI, XXXII, of Contempt Certificate and sentenced to Four Months on each contempt to run concurrently, and to be committed to custody of the Atty. Genl. or his authorized representative for imprisonment on Nov. 15, 1949.

"Harry Sacher adjudged guilty of contempt of court as specified in Specifications I, II, V, VI, VII, VIII, XII, XIV, XV, XVI, XVII, XVIII, XIX, XXV, XXVII, XXVIII, XXIX, XXX, XXXI, XXXIII, XXXVI, XXXVII, XXXIX, of Contempt Certificate and sen-

tenced to Six Months on each contempt to run concurrently, and to be committed to custody of the Atty. Genl. or his authorized representative for imprisonment on Nov. 15, 1949.

"Richard Gladstein adjudged guilty of contempt of court as specified in Specifications I, IV, VI, VIII, X, XI, XII, XIII, XVIII, XX, XXIII, XXIV, XXVI, XXVII, XXXI, XXXII, XXXIV, XXXV, of Contempt Certificate and sentenced to Six Months on each contempt to run concurrently, and to be committed to custody of the Atty. Genl. or his authorized representative for imprisonment on Nov. 15, 1949.

"George W. Crockett, Jr., adjudged guilty of contempt of court as specified in Specifications I, III, VII, XXI, XXII, XXVII, XXIX, XXXVII, XXXVIII, of Contempt Certificate and sentenced to Four Months on each contempt to run concurrently, and to be committed to custody of the Atty. Genl. or his authorized representative for imprisonment on Nov. 15, 1949."

On the 21st day of October each of the appellants herein filed a notice of appeal from the order of contempt made against him. Such notice of appeal was filed in the office of the Clerk of the District Court of the Southern District of New York.

On the 28th day of October, 1949 the appellants by Raphael H. Weissman, their attorney, moved in this Court for a stay of execution of the prison sentence imposed upon each of the appellants respectively.

By its order dated November 1, 1949 this Court stayed execution of the sentences imposed upon the appellants until December 12, 1949, at which time application for further stay may be made. By the said order the Court set the argument of the appeal for December 12, 1949.

Statement Under Rule 15(b).

Thereafter and on November 25, 1949 an order of substitution of attorneys was filed whereby Wolf, Popper, Ross & Wolf, 160 Broadway, New York City were substituted for the appellants in place and stead of Raphael H. Weissman, Esq. John F. X. McGohey, Esq., U. S. attorney for the Southern District of New York, represented the Government on the trial of the *United States* v. *William Z. Foster et al.* On this appeal the Government is represented by Irving H. Saypol, Esq., presently U. S. attorney for the said District.

On the said 25th day of November, 1949 the attorneys for the appellants filed a designation of the record on appeal.

On the 30th day of November, 1949 the record of the proceedings in the Court below was certified by the Clerk of the U. S. District Court for the Southern District of New York and docketed in the office of the Clerk of this Court.

On the 5th day of December, 1949, on application of the appellants, this Court stayed execution of the sentences until February 6, 1950. By the said order, the Court set argument of the appeal for February 6, 1950.

Notice of Appeal of Appellant Eugene Dennis.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA v. EUGENE DENNIS, Defendant.	C 131-36

Name and address of appellant:

Eugene Dennis, 401 Broadway, New York 13, N. Y., Room 1602.

Name and address of appellant's attorney:

Eugene Dennis, Attorney Pro Se, 401 Broadway, New York 13, New York, Room 1602.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date and any sentence:

Order adjudges appellant guilty of contempt of court as specified in certificate accompanying said order. Order is dated October 14, 1949. Appellant sentenced to imprisonment for period of six months.

Name of institution where now confined, if not on bail:

Order appealed from provides that sentence shall commence on November 15, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, October 21, 1949.

EUGENE DENNIS,
Appellant.

Notice of Appeal of Appellant George W. Crockett, Jr.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. GEORGE W. CROCKETT, JR., Defendant.	C 131-36

Name and address of appellant:

George W. Crockett, Jr., 401 Broadway, New York 13, N. Y., Room 1602.

Name and address of appellant's attorney:

George W. Crockett, Jr., Attorney Pro Se, 401 Broadway, New York 13, N. Y., Room 1602.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date and any sentence:

Order adjudges appellant guilty of contempt of court as specified in certificate accompanying said order. Order is dated October 14, 1949. Appellant sentenced to imprisonment for period of four months.

Name of Institution where now confined, if not on bail:

Order appealed from provides that sentence shall commence on November 15, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, October 21, 1949.

GEORGE W. CROCKETT, JR.,
Appellant.

Notice of Appeal of Appellant Richard Gladstein.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. RICHARD GLADSTEIN, Defendant.	C 131-36

Name and address of appellant:

Richard Gladstein, 401 Broadway, New York 13, N. Y., Room 1602.

Name and address of appellant's attorney:

Richard Gladstein, Attorney Pro Se, 401 Broadway, New York 13, N. Y., Room 1602.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date and any sentence:

Order adjudges appellant guilty of contempt of court as specified in certificate accompanying said order. Order is dated October 14, 1949. Appellant sentenced to imprisonment for period of six months.

Name of Institution where now confined, if not on bail:

Order appealed from provides that sentence shall commence on November 15, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, October 21, 1949.

RICHARD GLADSTEIN,
Appellant.

Notice of Appeal of Appellant Abraham J. Isserman.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. ABRAHAM J. ISSERMAN, Defendant.	C 131-36

Name and address of appellant:

Abraham J. Isserman, 401 Broadway, New York 13, N. Y., Room 1602.

Name and address of appellant's attorney:

Abraham J. Isserman, Attorney Pro Se, 401 Broadway, New York 13, N. Y., Room 1602.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date and any sentence:

Order adjudges appellant guilty of contempt of court as specified in certificate accompanying said order. Order is dated October 14, 1949. Appellant sentenced to imprisonment for period of four months.

Name of Institution where now confined, if not on bail:

Order appealed from provides that sentence shall commence on November 15, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, October 21, 1949.

ABRAHAM J. ISSERMAN,
Appellant.

Notice of Appeal of Appellant Louis F. McCabe.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. LOUIS F. McCABE, Defendant.	C 131-36

Name and address of appellant:

Louis F. McCabe, 401 Broadway, New York 13, N. Y., Room 1602.

Name and address of appellant's attorney:

Louis F. McCabe, Attorney Pro Se, 401 Broadway, New York 13, N. Y., Room 1602.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date and any sentence:

Order adjudges appellant guilty of contempt of court as specified in certificate accompanying said order. Order is dated October 14, 1949. Appellant sentenced to imprisonment for period of thirty days.

Name of Institution where now confined, if not on bail:

Order appealed from provides that sentence shall commence on November 15, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, October 21, 1949.

LOUIS F. McCABE,
Appellant.

Notice of Appeal of Appellant Harry Sacher.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. HARRY SACHER, Defendant.	C 131-36

Name and address of appellant:

Harry Sacher, 401 Broadway, New York 13, N. Y., Room 1602.

Name and address of appellant's attorney:

Harry Sacher, Attorney Pro Se, 401 Broadway, New York 13, N. Y., Room 1602.

Offense: Contempt of Court.

Concise statement of judgment or order, giving date and any sentence:

Order adjudges appellant guilty of contempt of court as specified in certificate accompanying said order. Order is dated October 14, 1949. Appellant sentenced to imprisonment for period of six months.

Name of Institution where now confined, if not on bail:

Order appealed from provides that sentence shall commence on November 15, 1949.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, October 21, 1949.

HARRY SACHER,
Appellant.

Order re Eugene Dennis, Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

EUGENE DENNIS,

Defendant.

ORDER ON CONTEMPT

On this 14th day of October, 1949, the defendant appeared in person.

IT IS ADJUDGED that the defendant is guilty of contempts of court as specified in the accompanying certificate, to wit: Specifications I, XIX, XXII, XXXI, XL.

IT IS ADJUDGED that the defendant is sentenced to imprisonment for a period of six months on each contempt, and that the aforesaid sentences shall be served concurrently.

IT IS ADJUDGED that on the 15th day of November, 1949, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months.

IT IS ORDERED that the Clerk deliver a certified copy of this order on contempt and the accompanying certificate to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(sgd.) HAROLD R. MEDINA,
United States District Judge.

Order re George W. Crockett, Jr., Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

GEORGE W. CROCKETT, JR.,
Defendant.

ORDER ON CONTEMPT

On this 14th day of October, 1949, the defendant appeared in person.

IT IS ADJUDGED that the defendant is guilty of contempts of court as specified in the accompanying certificate, to wit: Specifications I, III, VII, XXI, XXII, XXVII, XXIX, XXXVII, XXXVIII.

IT IS ADJUDGED that the defendant is sentenced to imprisonment for a period of four months on each contempt, and that the aforesaid sentences shall be served concurrently.

IT IS ADJUDGED that on the 15th day of November, 1949, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four months.

IT IS ORDERED that the Clerk deliver a certified copy of this order on contempt and the accompanying certificate to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(sgd.) HAROLD R. MEDINA,
United States District Judge.

Order re Richard Gladstein, Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

RICHARD GLADSTEIN,

Defendant.

ORDER ON CONTEMPT

On this 14th day of October, 1949, the defendant appeared in person.

IT IS ADJUDGED that the defendant is guilty of contempts of court as specified in the accompanying certificate, to wit: Specifications I, IV, VI, VIII, X, XI, XII, XIII, XVIII, XX, XXIII, XXIV, XXVI, XXVII, XXXI, XXXII, XXXIV, XXXV.

IT IS ADJUDGED that the defendant is sentenced to imprisonment for a period of six months on each contempt, and that the aforesaid sentences shall be served concurrently.

IT IS ADJUDGED that on the 15th day of November, 1949, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months.

IT IS ORDERED that the Clerk deliver a certified copy of this order on contempt and the accompanying certificate to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(sgd.) HAROLD R. MEDINA,
United States District Judge.

Order re Abraham J. Isserman, Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

ABRAHAM J. ISSERMAN,

Defendant.

ORDER ON CONTEMPT

On this 14th day of October, 1949, the defendant appeared in person.

IT IS ADJUDGED that the defendant is guilty of contempts of court as specified in the accompanying certificate, to wit: Specifications I, VI, VII, XII, XXVII, XXXI, XXXII.

IT IS ADJUDGED that the defendant is sentenced to imprisonment for a period of four months on each contempt, and that the aforesaid sentences shall be served concurrently.

IT IS ADJUDGED that on the 15th day of November, 1949, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four months.

IT IS ORDERED that the Clerk deliver a certified copy of this order on contempt and the accompanying certificate to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(sgd.) HAROLD R. MEDINA,
United States District Judge.

Order re Louis F. McCabe, Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

LOUIS F. McCABE,

Defendant.

ORDER ON CONTEMPT

On this 14th day of October, 1949, the defendant appeared in person.

IT IS ADJUDGED that the defendant is guilty of contempts of court as specified in the accompanying certificate, to wit: Specifications I, VI, VII, VIII, IX, XXVII.

IT IS ADJUDGED that the defendant is sentenced to imprisonment for a period of thirty days on each contempt, and that the aforesaid sentences shall be served concurrently.

IT IS ADJUDGED that on the 15th day of November, 1949, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty days.

IT IS ORDERED that the Clerk deliver a certified copy of this order on contempt and the accompanying certificate to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(sgd.) HAROLD R. MEDINA,
United States District Judge.

Order re Harry Sacher, Appealed From.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

HARRY SACHER,

Defendant.

ORDER ON CONTEMPT

On this 14th day of October, 1949, the defendant appeared in person.

IT IS ADJUDGED that the defendant is guilty of contempts of court as specified in the accompanying certificate, to wit: Specifications I, II, V, VI, VII, VIII, XII, XIV, XV, XVI, XVII, XVIII, XIX, XXV, XXVII, XXVIII, XXIX, XXX, XXXI, XXXIII, XXXVI, XXXVII, XXXIX.

IT IS ADJUDGED that the defendant is sentenced to imprisonment for a period of six months on each contempt, and that the aforesaid sentences shall be served concurrently.

IT IS ADJUDGED that on the 15th day of November, 1949, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months.

IT IS ORDERED that the Clerk deliver a certified copy of this order on contempt and the accompanying certificate to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(sgd.) HAROLD R. MEDINA,
United States District Judge.

Contempt Certificate Pursuant to Rule 42(a), Federal Rules of Criminal Procedure.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN, and EUGENE DENNIS,

Defendants.

In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below were committed in the actual presence of the Court and were seen or heard by the Court during the trial of the case of *United States of America* v. *Foster, et. al.*, C 128-87, which commenced on January 17, 1949.

By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

Accordingly, I adjudge the following guilty of the several criminal contempts described below:

Defendant	*Specifications*
Harry Sacher	I, II, V, VI, VII, VIII, XII, XIV, XV, XVI, XVII, XVIII, XIX, XXV, XXVII, XXVIII, XXIX, XXX, XXXI, XXXIII, XXXVI, XXXVII, XXXIX.
Richard Gladstein	I, IV, VIII, X, XI, XII, XIII, XVIII, XX, XXIII, XXIV, XXVI, XXVII, XXXI, XXXII, XXXIV, XXXV.
George W. Crockett, Jr.	I, III, VII, XXI, XXII, XXVII, XXIX, XXXVII, XXXVIII.
Louis F. McCabe	I, VI, VII, VIII, IX. XXVII.
Abraham J. Isserman	I, VI, VII, XII, XXVII, XXXI, XXXII.
Eugene Dennis	I, XIX, XXII, XXXI, XL.

I.

During the entire trial, Messrs. Sacher, Gladstein, Crockett, McCabe, and Isserman, attorneys and counsellors-at-law, and after March 17, 1949, Mr. Dennis, attorney *pro se,* joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster, et al.,* C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities.

To effect this plan, these defendants in this proceeding, contemptuously and without justification:

a. Disregarded numerous warnings of the Court concerning their wilful delaying tactics, except for ironical references thereto;

b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;

c. Insinuated that there was connivance between the Court and the United States Attorney;

d. Insisted on objecting one after another to rulings of the Court, despite a ruling on the first day of the trial, repeated several times thereafter, that all objections and exceptions would inure to the benefit of each of their clients unless disclaimed;

e. Persisted in making long, repetitious, and unsubstantial arguments, objections, and protests, working in shifts, accompanied by shouting, sneering, and snickering;

f. Urged one another on to badger the Court;

g. Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality;

h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;

i. Disregarded repeatedly and flagrantly the orders of the Court not to argue without permission and to desist from further argument or comment;

j. Disregarded rulings on the admissibility of evidence so as to endeavor to place before the jury by leading questions the subject matter excluded;

k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

l. Accused the Court of racial prejudice without any foundation; and

m. Generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the Court which could then be relied upon as a demonstration of the Court's unfitness to preside over the trial.

II.

On January 21, 1949, during the hearing on defendants' challenge to the jury system, Herbert Allen, a member of the petit jury panel for the January Term of Court, was called as the first witness in support of the challenge.

During this direct examination by Mr. Gladstein, Mr. Allen was asked for the assessed valuation of his home, to which question an objection was sustained. Thereafter, lengthy argument was directed to the Court by Messrs. Gladstein, McCabe, Isserman and Sacher, which was brought to a conclusion with Mr. Sacher shouting at the Court (Ch. Tr. 1390):

> "Well, let me make one thing clear; your Honor said that you were going to conduct a hearing, and I tell you now if what you are going to do is to prevent us from asking these questions and proving the fact, then this hearing is no hearing; *it is just a sham and a pretense designed to prevent the establishment of those facts which will prove that the system is precisely what we say it is.*"

III.

On February 2, 1949, during the challenge to the jury system, Harry Rosten, Research Manager for THE NEW YORK TIMES, was being questioned by Mr. Isserman about Challenge Exhibit No. 20, already in evidence. Objection was made to the line of questioning being conducted by Mr. Isserman, and following argument, the Court sustained the objection. Thereupon, Mr. Gladstein and Mr. Sacher further argued the matter. They were followed by Mr. Crockett, who did not argue but limited himself to the insinuation quoted below (Ch. Tr. 2302):

> "I have only one comment to make, your Honor. I have listened very carefully to the proceedings during the whole time this was going on and what surprises me, frankly, your Honor, is the frequency with which Mr. McGohey will make an objection and the Court will sustain the objection without asking Mr. McGohey to state the reasons for his objection or giving us an opportunity to suggest to the Court the reasons why the objection should be overruled."

IV.

On February 3, 1949, during the challenge to the jury system, defense counsel and the Court engaged in a discussion, in the course of which Mr. Gladstein, in an isolent manner, said (Ch. Tr. 2461):

"Now although everybody, one would think, who did not prejudge the matter here——"

and, after interruption, continued (Ch. Tr. 2463):

"Mr. Gladstein: Now, before the Court's interruption I was about to point out that what is important here is the question of your Honor's determinations upon the objections Mr. McGohey has raised, and sometimes even without him suggesting it——

The Court: Yes, maybe I have a right to make a comment from the bench once in a while. It seems probably wrong to you and your colleagues, but it is commonly done, and I have no intention whatever of refraining.

Mr. Gladstein: I wasn't referring to your Honor's comments, because they are always welcome. I was referring to the rulings that you make adverse to the defendants even before the United States Attorney opens his mouth to make an objection. That has happened."

After further colloquy, during which the Court invited a memorandum from Mr. Gladstein in respect to the admissibility of certain proof; Mr. Gladstein continued his reflection on the Court's integrity, as follows (Ch. Tr. 2466-2467):

"Mr. Gladstein: And it is not an easy task to research the authorities and present them to you on the question of the admissibility of this kind of data which is obtained by sampling methods. But if your Honor,

if there is any possibility of having the effect of those authorities respected and obtaining a reconsideration of the ruling that your Honor has taken, I will certainly do whatever I can to get that memorandum of law to the Court.

The Court: I try to respect all authorities, those that are controlling and those that are persuasive. I try to do my duty as a Judge. I do not think it is very nice of you to put in that little insinuation, but I take it in good part. And so we will pass it.

Mr. Gladstein: Very well. It isn't half of what I felt like saying, your Honor, as a result of what you said.

The Court: Well, I can well believe that."

V.

On the same afternoon, after hearing lengthy argument by Mr. Gladstein (Ch. Tr. 2483-2489), the Court sustained a Government objection to certain evidence proffered through the witness Wilkerson. After a recess granted at Mr. Sacher's request, Mr. Crockett and Mr. Sacher argued for a reconsideration of the ruling (Ch. Tr. 2490-2501). Continuing the attack of defense counsel upon the Court and completely ignoring the fact that the Court had heard Mr. Gladstein at length before ruling, Mr. Sacher loudly complained (Ch. Tr. 2494):

"I repeat, this is an Alice in Wonderland procedure. We always get the sentence first and then the trial. Now, if we would just get back to ordinary procedure with trial first and sentence afterwards, this might be a little bit more real * * * *".

The Court directed Mr. Sacher to "completely refrain from further argument along this line" (Ch. Tr. 2494). Notwithstanding the direction of the Court, Mr. Sacher

shortly returned to his attack upon the Court, as follows (Ch. Tr. 2500):

> "Is it because the evidence is becoming too devastating for the Government that we must now be circumscribed? This is the telling stuff. Why are we stopped at this point when we proceed definitely to show that the Republican Party vote is the guide to the determination of how many jurors come from a district, and not that impartial selection which the Constitution and the statute require? That is what is at stake in this instance, your Honor, and I submit I don't want to take any more of your time if we are doing nothing to influence you; I don't want to be like the Yankee in King Arthur's Court * * *".

VI.

On February 4, 1949, during the challenge to the jury system and in the course of the direct examination of the witness Marcantonio by Mr. Isserman, the witness was asked to state how long certain low-rent housing projects had been in existence. The Court sustained an objection and told Mr. Isserman that it did not wish to hear argument from him. However, Mr. Isserman proceeded to argue and he was joined by Messrs. Gladstein, Sacher and McCabe. Repeatedly, the Court interrupted counsel stating that it did not desire to hear argument. Nevertheless, counsel continued (See Ch. Tr. 2544-2548). The Court then directed counsel to proceed with the interrogation of the witness (Ch. Tr. 2548). In the teeth of the direction, Mr. Gladstein continued (Ch. Tr. 2548-2549), as follows:

> "* * * since your Honor won't permit me to refer to the authorities, then I refer to a practical suggestion, and that is if instead of consuming time in arguing as to whether or not we have the right to make the simple statement for the record as to what the witness

would say if he were permitted to answer the question to which the United States Attorney has objected, and which objection has been sustained—if instead of doing that we were simply allowed to follow the normal, usual routine procedure that takes place even before juries * * * ".

Mr. Sacher then commenced speaking and the Court stated that it did not desire to hear him at that time (Ch. Tr. 2549). Despite this, Mr. Sacher continued (Ch. Tr. 2549-2550), as follows:

"But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor is aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congressman Marcantonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial; and I say——

The Court: Did I say that?

Mr. Sacher: Well, you imply that very broadly. If your Honor wishes to deny it I shall be glad to have the denial. But I got the impression very distinctly that your Honor's observation was made just on the threshold of the Congressman's testimony and that it was designed to color the effect and impression to be given to it, and I do not believe, your Honor, that that is appropriate.

The Court: If you are only trying to provoke me, Mr. Sacher, you are wasting your time."

Shortly thereafter, Mr. McCabe concluded with the following statement (Ch. Tr. 2554):

"Yes, but I say that it seems to me that that is what is in your Honor's mind, and that also may very well

be addressed to someone outside of this courtroom, and I think that the record, if reviewed by some other authority may indicate unusual degree of tolerance in the face of particularly annoying tactics, which I don't think we are guilty of."

VII.

On the same day, while the witness Marcantonio was still being examined by Mr. Isserman, the witness was asked if he had found many persons residing in his Congressional District who were known to him to be of average intelligence. The Court sustained an objection. However, Mr. Isserman proceeded to argue the matter. Finally, the Court sought to close argument, directing Mr. Isserman to take his exception (Ch. Tr. 2621). Nevertheless, Mr. Isserman persisted (Ch. Tr. 2621-2622), as follows:

"Mr. Isserman: I was in the middle of my objection when your Honor interrupted to misconstrue a statement that I made. I said, conditionally——

The Court: I wish you would not say that I do that, to misconstrue.

Mr. Isserman: It seems to me to have been misconstrued.

The Court: That seems an impertinent thing. Mr. Isserman, that seems an impertinent thing. You are an experienced lawyer and you know better than to do that. Now, you lawyers have been at that here for three weeks, perhaps to provoke me—I don't know what the reason may be. But I do know that if you keep it up some day, perhaps now, perhaps hereafter, there will be a time of reckoning. Now, please don't do that.

Mr. Isserman: And I would like now to object to your Honor's characterization of my comment.

Now, the statement that I was making——

The Court: Well, when you charge me with deliberately misconstruing something I regard that as impertinence.

Mr. Isserman: I did not say it was deliberate, your Honor. But I said it seemed to me to be that. But, in any event, what I was saying was this: I said if this were a small community the method of proof, as indicated by the cases, would be to call the persons directly involved. Your Honor has thus far conditionally ruled that your Honor would not allow the calling of those persons who would give the direct evidence on their status."

Mr. Isserman continued his argument and the Court again interrupted to remind Mr. Isserman of the Court's previous direction as follows (Ch. Tr. 2623-2624):

"The Court: Now, Mr. Isserman——

Mr. Isserman: Now, the reason why——

The Court: Let me say something to you. In every judicial proceeding that I am familiar with, and I have had a pretty large experience at the bar, when the Court indicated that it didn't want any more argument on a point the lawyer quietly desisted. If he chose to except he noted his exception and went on to something else. Here, perhaps in an endeavor to wear me out, which it is gradually doing, you keep that up, and you make the argument or arguments just as you are doing now. And I say, as I have said before, that that in my judgment is not the proper conduct of an attorney. It is extremely wearing on the Court in a trial of this kind. I suppose it will wind up by bringing me down. I hope it won't. I may have the strength to go on, and I hope I shall. But I tell you—stop it.

Mr. Isserman: I would like to take exception to your Honor's remark as an improper characterization of my conduct.

I would like to state my—complete my objection for the record if I may.

The Court: You insist on going ahead again, and all I can do, as I do not intend to make a rumpus about it, is to advise you again—please desist; and then, if you insist upon going on, why, you must take the consequences, whatever they may be.

Mr. Isserman: May I state my objection for the record?

The Court: You may not."

Instead of proceeding with the interrogation of the witness, Messrs. McCabe, Sacher and Crockett carried on the argument. The Court told Mr. McCabe that argument was unnecessary (Ch. Tr. 2625), and then Mr. Sacher, angrily shouting, offered his "observation" to the Court (Ch. Tr. 2626-2627). Mr. Crockett thereupon took up the argument and failed to desist until the Court warned him that his insistence on going on was in defiance of the Court's direction (Ch. Tr. 2632).

VIII.

The jury challenge commenced on January 17, 1949. On February 11th the Court determined that counsel for the defendants had taken almost four weeks to put in evidence which could have been adduced in no more than three or four days (Ch. Tr. 3291) and accordingly the Court concluded that defense counsel had engaged in a "deliberate effort here to make a mockery of justice" (Ch. Tr. 3290). At the close of court on that day, the Court directed defense counsel to submit a statement showing what they proposed to prove in the remainder of the challenge and how they proposed to prove it (Ch. Tr. 3344-3345). The statement was submitted on February 14th (Ch. Tr. 3346) and was found insufficient (Ch. Tr. 3415). At this juncture, the Court in the exercise of its discretion as to the order of

proof, refused to hear further testimony at that time on behalf of defendants in connection with their challenge to the jury system, and directed that the Government proceed with its proof. Counsel for defendants vociferously objected and, in the course of argument, Mr. Sacher, in an insolent manner, said (Ch. Tr. 3420):

> "Now, I must in all candor say, your Honor, that it is very difficult for us among the defense counsel to believe that the United States Attorney was caught unawares in the request or the direction which the Court made to him to proceed with his proof on an hour and half's notice——"

Other counsel proceeded to object, which led the Court to remark that the way the hearing was conducted was such as he never thought he would see in a court of justice (Ch. Tr. 3433). Thereupon, Mr. McCabe in a sarcastic tone said (Ch. Tr. 3433):

> "I will agree, your Honor, on that last point; the way this case has been conducted is one which I certainly hoped that I would never see in a court of justice.
>
> The Court: You mean the way it has been conducted by me, I take it.
>
> Mr. McCabe: I mean that exactly."

The Court stated (Ch. Tr. 3434):

> "I have been subjected to every kind of vituperation here and you might just as well tell me how I am going to be reversed and all that. It remains to be seen what will be done by higher courts, and your telling me about that isn't going to affect my judgment. I am trying my best here to rule justly, to rule impartially, to protect the rights of these defendants despite the conduct of their counsel, and I shall continue to do that."

Mr. McCabe followed this with the statement (Ch. Tr. 3434):

> "I rise simply to say—to except to your Honor's characterization that anything the defendants' attorneys have done is sabotage. Sabotage there has been, but as I say I think it has been a sabotage of the entire system of justice in this court, and I say that we are the only ones who seem to be interested in that."

Thereupon, Mr. Gladstein jumped to his feet and, angrily advancing toward the bench, he said in a truculent manner (Ch. Tr. 3434-3435):

> "Well, now may I ask your Honor this: does your Honor really mean that the record shall indicate that it is a protection of the rights of these defendants for your Honor to say when I offer a piece of evidence, 'Mr. Gladstein, that would be material, that would be relevant, that would help to prove your case, but I am not going to let you put it in evidence because I don't like the way you and your colleague lawyers have been behaving?
>
> The Court: Did I say that?
>
> Mr. Gladstein: In effect, yes, because you have absolutely rejected and you have prevented me from introducing evidence——"

IX.

On February 18, 1949, during the defendants' challenge to the jury system, Mr. McCabe diverted the course of his argument to remark (Ch. Tr. 4116-4117):

> "I would like to say to your Honor that I really have come to believe that the constant repetition by your Honor at intervals which are almost as regular as the tolling of Big Ben—and I mean nothing personal in

the allusion—or the eruption of Old Faithful out in Yellowstone Park, or wherever it is—these come at stated periods. I think you can pick 11.20 and 3.20 when these statements come that we are delaying; we are doing nothing; your Honor has seen nothing in the record. I say, I don't want——

The Court: What is the point of those times, of those particular times?

Mr. McCabe: 11.30 I think is the deadline for the afternoon papers, your Honor, and I think around 3.20 is the deadline——"

The Court (Ch. Tr. 4117):

"Well, that is something I had no idea of, and I must say you have got an ingenious mind to suppose that something was said for such a purpose. I think you ought to be ashamed of yourself."

See also Tr. 6980.

X.

On February 28, 1949, during the challenge to the jury system, Mr. Gladstein asked the Court to reconsider its ruling with respect to a document which he had sought to have admitted into evidence. The Court adhered to its prior ruling and stated it did not desire to hear further argument (Ch. Tr. 4559). Mr. Gladstein refused to heed the direction of the Court, as follows (Ch. Tr. 4560-4562):

"Mr. Gladstein: But, your Honor, *upon the pretext that this is a confidential document,* the one that I am asking about, the one that was written by this witness, *you are preventing me from showing* without any question the final proof of the corruption of the system here in so far as they placed in charge of it a man who was the director of a dozen corporations, who——

The Court: Mr. Gladstein——

Mr. Gladstein: May I finish, Judge?

The Court: I consider your language offensive and not fitting for an officer of this court to use when you speak of a ruling by the Court as done under a pretext, and use such other language as you used there. You must know that you are doing something that you should not do, and I direct you to desist.

Mr. Gladstein: Your Honor, I ask that you consider the law that applies to this question because——

The Court: I heard what you said.

Mr. Gladstein: Do you refuse to have a memorandum of law submitted to you?

The Court: And I consider the language offensive.

Mr. Gladstein: Do you——

The Court: And you know, you know that it is, but of course it may be pleasing to some of the people.

Mr. Gladstein: Well, that is not—I have never said anything——

The Court: But that is an additional reason why you should not do it.

Mr. Gladstein: I have never said anything for the purposes of pleasing anyone here but for the purpose of trying to put in evidence and to persuade your Honor to do what I think the law requires.

The Court: Well, you are not going to provoke me, so you might as well stop doing that.

Mr. Gladstein: I want to make an offer of proof concerning this letter which, according to the witness' statement, is in this building and readily available and which, by the way, Mr. Duncan, it was called for in the subpoena that was served on you—isn't that so?

The Court: I direct you not to make this one. It is already sufficiently evident in the case what the paper is and what your claims about it are, and mere repetition of it will only serve to use up your time that you can employ to better advantage.

Mr. Gladstein: All right. Let the record show that it is a letter written in May, 1942 by Mr. Duncan, the present witness, and let the record further show that I called for that letter and for the letter or questionnaire in which it was a response, to which it was a response——

The Court: Now, Mr. Gladstein, you have again done what I have told you not to do.

Mr. Gladstein: I want the record to show that I had the subpoena served on this witness. Can it now show that?

The Court: I understand what you want, but the accumulation of these acts of disobedience to my rulings is something that concerns you, and I hope that you won't keep at it any more."

XI.

On the same afternoon, shortly after the foregoing incident, Mr. Gladstein offered in evidence the 1949 edition of "Poor's Register of Directors," consisting of 3200 pages. The Court stated that it would hear Mr. Gladstein on the question of the relevancy of the exhibit. After hearing a statement from Mr. Gladstein, the Court sustained the objection to the book. Thereupon Mr. Gladstein, in a sarcastic and impertinent manner, said (Ch. Tr. 4590):

"I thought when you heard the facts you would, Judge."

XII.

On March 1, 1949, in the course of the cross-examination of the witness John Whittier Darr, Jr., the witness was asked by Government counsel how long he had been a member of American Youth for Democracy. Mr. Gladstein objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, but Mr. Gladstein continued to argue (Ch. Tr. 4781).

As soon as Mr. Gladstein finished, Mr. Sacher and Mr. Isserman interjected sarcastic comments, as follows (Ch. Tr. 4781):

> "Mr. Sacher: May I respectfully say to your Honor that membership in the American Youth for Democracy has no more bearing on the credibility of this witness than the fact that Judge Knox is director of two of the biggest corporations in this country."
>
> "Mr. Isserman: Or that your Honor is in the Social Register."

The Court again stated that it overruled the objection and directed the witness to answer the question and said to the witness he should bear in mind that he should not make a speech as he had done a moment ago. Thereupon Mr. Gladstein said (Ch. Tr. 4782):

> "Let the record show my objection to the Court's gratuitous and improper characterization of the witness' testimony, as an effort to make a speech——."

XIII.

On April 4, 1949, in the course of the cross-examination of the witness Budenz, the United States Attorney objected to a line of questioning by Mr. Gladstein; who was directed by the Court to turn to something else (Tr. 2296). Mr. Gladstein persisted in arguing the matter with the Court. The Court again directed Mr. Gladstein to turn to another subject and told him that when a lawyer persists in arguing about the same thing the only inference is that the lawyer is trying to leave the impression that the facts recited in questions asked by the lawyer and ruled out actually represent the truth. Mr. Gladstein thereupon made the following statement in the presence of the jury (Tr. 2297):

> "They do represent the truth and I intend to show that they do. Let me put it this way——"

XIV.

On April 5, 1949, during the cross-examination of the witness Louis F. Budenz, the following transpired (Tr. 2479-2480):

"Q. Can't you say certainly whether it was in August or not?

Mr. McGohey: I object.

The Court: Overruled.

It is puzzling me as to what difference it made as to what date he made the speech but——

Mr. Sacher: When this witness undertakes——

The Court: Please don't argue. I allow the question.

Mr. Sacher: When your Honor makes a provocative remark and your Honor says you don't know what difference it makes——

The Court: I strike out your remark about my making a provocative remark. I did not make a provocative remark and I consider your response insolent. Now you please stop that. I am not in the habit of making provocative remarks. I am trying to do my best to administer justice.

Mr. Sacher: And I am trying to defend my clients.

The Court: I will not have insolence from the bar.

Mr. Sacher: I am trying to do my best to defend my clients.

The Court: You please refrain from further comment and frame your next question. I am used to having respect from the bar.

Mr. Sacher: I wish to say to your Honor that I don't want to show you any disrespect.

The Court: You reframe your question.

Mr. Sacher: And you know it.

The Court: Oh, yes; I know it. I sure do.

Mr. Sacher: And I think it is a reciprocal objection. I think lawyers who are defending their clients for their liberty should not be treated as though they were dogs in the courtroom either.

The Court: That is an insolent remark and I strike it out, the statement that you have been treated like a dog. I don't see how you dare speak that way.

If you can control yourself, please ask the next question.

Mr. Sacher: I am trying, your Honor."

XV.

During a session of the court on April 7, 1949, while a Government witness was under direct examination, Government counsel invited the Court's attention to the fact that a Mr. Simon Gerson, who regularly had been seated at defense counsel's table, was circulating certain papers to representatives of the press in the courtroom, whereupon the following colloquy took place (Tr. 2750-2751):

"Mr. Gordon: I see Mr. Gerson passing out some papers to the press section, your Honor.

Mr. Sacher: Now that is absolutely wrong, your Honor. I asked Mr. Gerson to be good enough to speak to someone for me. This is another instance of surveillance.

The Court: Well, if Mr. Gerson is passing out press releases in the courtroom, please stop it.

Mr. Sacher: Well, there are no press releases.

The Court: All right. Then that settles it, that is the end of it.

Mr. Sacher: But it is uncomfortable, your Honor, to be under observation. Can't we move freely in the courtroom without having our movements remarked upon?

The Court: Well, if you haven't been moving freely in the courtroom, Mr. Sacher, then my eyes and ears have been deceiving me.

(Mr. Gordon hands paper to the Court.)

The Court: Now let us see what this paper is that Mr. Gordon produces.

(After examining) Why, it is a press release—doing just what you said was not being done.

Mr. Sacher: I asked Mr. Gordon—Mr. Gerson to see someone for me on the outside, and it had nothing to do with press releases, your Honor.

The Court: Well, I have in my hand a press release which it appears was just handed out by him and which you deny.

Now I don't want to get into any collateral controversies here and we will just let it rest with this direction: I do not want any press releases handed around here in the courtroom or anything of that kind. Now this isn't a propaganda place here. This is a court of justice where people are in trial and I direct that no more of that be done."

The press release which was retained by the Court bears the pictures of the defendants and was captioned as follows:

"TRIAL OF THE TWELVE

401 Broadway—Room 1601-02-
New York 13, N. Y.—
Walker 5-2010

Public Relations Office
For Release
April 7, 1949"

The records of the Clerk of the Court reflect that on January 17, 1949, Messrs. Sacher, Gladstein, Isserman,

Crockett and McCabe notified the Clerk that for all purposes relating to any matter in the trial the address of each is 401 Broadway, Room 1602, New York 13, New York, and that the office telephone number is WAlker 5-2010, the same address and telephone number which appeared on the press release referred to above.

XVI.

On April 19, 1949, in the course of the direct examination of the witness Charles Nicodemus, Mr. Gladstein objected to a question which had not yet been completed, whereupon the following transpired (Tr. 3649-3650):

"The Court: Well, it seems to me, Mr. Gordon, there is something in that. Why don't you ask him a question without covering the matter of the other testimony? Is there something you want to direct his attention to?

Mr. Gordon: Yes, I want to ask him whether he had received any instructions.

Mr. Sacher: I object to this, your Honor, because it is quite obvious——

Mr. Gordon: Why does Mr. Sacher shout me down?

Mr. Sacher: Oh, Mr. Sacher shouting this little boy down.

The Court: Now, Mr. Sacher, you are getting back into your old form.

Mr. Sacher: Your Honor, I have consistently been in this form and no observations from the bench will change that form.

The Court: You never can tell what will happen.

Mr. Sacher: With your Honor up there I suppose that is true.

The Court: I might possibly get control of my courtroom. I think I shall."

XVII.

On April 22, 1949, in the course of the direct examination of the witness Charles Nicodemus, the Court sustained an objection made by Mr. Gladstein to a question asked by Government counsel. Mr. Sacher then arose and asked the Court to admonish Government counsel not to ask questions which were leading. The Court pointed out that the objection had been sustained. Notwithstanding that Mr. Sacher already had stated the ground for his motion, Mr. Sacher then asked the Court whether he could say why he wanted the Court to rebuke Government counsel, but the Court refused permission. Mr. Sacher then remarked in a sarcastic manner (Tr. 3680):

> "I see, only Mr. Gordon and Mr. Nicodemus may speak."

XVIII.

On April 22, 1949, during the cross-examination of the witness Charles Nicodemus, Mr. Sacher asked the witness if he had pleaded guilty to an indictment for carrying concealed weapons. The Court, expressly stating that it understood that counsel was bringing out a conviction of crime, permitted him to proceed with the examination on this subject. Mr. Sacher then knew, on the basis of the entries reflected on the certified copies of the judgments in his possession, that the witness had been found not guilty on two separate charges, but he did not disclose those facts to the Court. Instead, he continued the cross-examination on this subject, knowing that the Court was permitting the line of examination on the theory that evidence concerning convictions for crime was being elicited. When Government counsel were permitted to examine the judgments and sought to inform the Court of the fact that the witness had been found not guilty, Mr. Sacher exerted every effort to prevent the disclosure of these facts to the Court (Tr.

In the course of redirect examination of the witness the Court reiterated that the judgments disclosed that the witness had been found not guilty (Tr. 3765-3766), whereupon the following occurred (Tr. 3767):

"Mr. Gladstein: And also, in connection with your Honor's statements that you will continue to tell the jury that the case in which Mr. Nicodemus was involved turned out as not guilty, would you be good enough to add, if you tell the jury that, that it was no doubt because Mr. Nicodemus was innocent that the Court imposed a sentence of $140?

The Court: You see, Mr. Gladstein, it is the first experience I have ever had either at the bar or at the bench where counsel were so brazen, where again and again they argued over the Judge's shoulder to the jury in what seems to be a deliberate attempt to induce the jury or some member thereof to disregard the Court's instructions. I have heretofore had occasion to tell counsel that that is treading on dangerous ground, and I hope it will not be repeated."

XIX.

On April 25, 1949, in the course of the cross-examination of the witness Garfield Herron by Mr. Gladstein, he offered a book in evidence, to which objection was made by the Government. After argument, the Court ruled that it would not admit the entire book, but, if there were some portion of it that was relevant, the Court would allow that portion in evidence (Tr. 3928-3932). At this point Mr. Sacher arose and argued that it was necessary to have the book in its entirety in evidence, and he continued the argument until the Court directed him to desist (Tr. 3936). Immediately, Mr. Dennis arose and the Court stated to him that it did not desire any further argument, saying that further talk would not be for the purpose of persuading the Court in

connection with his ruling, but for other purposes (Tr. 3937). Mr. Sacher thereupon arose and objected to the statement. The Court interrupted him, saying that he was not going to have the trial carried on for propaganda purposes. Mr. Sacher thereupon stated (Tr. 3937):

> "I object to that. That is what the prosecution is doing. We are trying to prove the truth here and we are being stopped from proving the truth. That is what is happening."

Following this, Mr. Dennis arose and stated he would like to make a brief observation. The Court again stated that it did not desire to hear further argument (Tr. 3937-3938). Nevertheless, Mr. Dennis commenced to make a statement. The Court interrupted, asking Mr. Dennis if he realized the Court had directed counsel not to argue (Tr. 3938). Despite this, Mr. Dennis continued, and the following occurred (Tr. 3938-3940):

> "Defendant Dennis: I would like to make one brief observation, your Honor, because this is not a small question. I would like to remind the Court that we eleven defendants are not charged——
>
> The Court: You realize I told you not to do this, don't you?
>
> Mr. Dennis: I understood I might make a brief observation.
>
> The Court: But you want to go on just the same. Now I don't think you are helping yourself by doing that, but that is your lookout.
>
> Defendant Dennis: I would, briefly, like to place the following cardinal question. We eleven defendants are not charged, as your Honor intimated, charged with conspiring directly or indirectly with attempting to or take any steps to overthrow our Government by force and violence. We are charged with an alleged

conspiracy to organize the Communist Party, which the prosecution claims would advocate and teach the necessity and the duty to overthrow the U. S. Government by force and violence, and that is to say we are charged with exercising our inalienable rights of free speech, free press and free assemblage, and——

"The Court: I suppose you are just daring me to do something to you now but I am not going to do it.

You gentlemen may be just as disorderly, just as disobedient, just as disrespectful as you choose to be, and you will not goad me into doing something which may prove only a source of difficulty in the trial.

Now I tell you again to stop."

Following the statement of the Court, Mr. Crockett arose and made an objection, and Mr. Dennis, who had remained on his feet, continued his statement, saying (Tr. 3340):

"And the final remark, your Honor, is that we defendants intend, as we are duty-bound to do, to show really what we have advocated, what——"

At this point the Court found it necessary to take an adjournment for five minutes to prevent Mr. Dennis from continuing to flout its direction.

XX.

On May 2, 1949, in the course of the cross-examination of the witness Angela Calomiris, the following transpired (Tr. 4471-4472):

"Q. Now you have said that in the 1947 course the first one of the subjects on which you studied at that course was capitalism and the class struggle, involving the nature of capitalism.

Mr. Wallace: Objection.

The Court: Sustained.

Mr. Gladstein: That is preliminary to a question. I haven't asked a question yet, your Honor.

The Court: All right.

Mr. Gladstein: It gets so that even before I ask a question it is sustained, the objection to it.

The Court: Now that I consider a distinct impertinence——

Mr. Gladstein: I did not ask a question.

The Court: —and just an accumulation of what you have been doing here. You say it gets so that the Court rules before you have asked a question, you intimate that I am so prejudiced here that I don't want to be fair and am not fair. Now you will please stop that. You are not helping yourself or your clients by doing it, I think."

XXI.

On May 4, 1949, in the course of the direct examination of the witness Thomas Younglove, the Government offered an educational outline in evidence. This was near the close of the day's session and Mr. Sacher requested a recess to afford defense counsel an opportunity to examine the exhibit. The Court asked if it would not be practical to go to some other subject, or if there were not some books which the witness would be called upon to identify. When Government counsel replied that he could not proceed to another subject, but that there were books that were to be identified, Mr. Sacher observed that if the validity of the introduction of any of the books depended upon the introduction of the proffered exhibit he would feel bound to raise an objection.

The Court then stated that if certain books were to be identified it could see no harm that could come to the defense. Thereupon Mr. Crockett arose and objected to the Court's anticipation of the nature of additional proof that the Government might offer. Although the books mentioned

by the Court were "Foundations of Leninism" and the "History of the Communist Party of the Soviet Union," both of which had been previously admitted into evidence and identified by numerous witnesses, he suggested that the Court was improperly familiar with the Government's evidence before it was adduced, as follows (Tr. 4826):

> "I don't think it is customary for the Court to show such familiarity with the possible course—with proof that the Government might present. That is the gist of it."

XXII.

On May 19, 1949, shortly after the luncheon recess, the Government rested its case and the Court set aside the balance of the day for the hearing of any motions the defense desired to make.

Instead of making their motions, defense counsel lengthily argued for an adjournment. During the argument, the following occurred (Tr. 6046-6048):

> "Defendant Dennis: I rise, first of all, your Honor, to protest most vigorously against the outrageous and arbitrary ruling which you have just made.
>
> The Court: Which ruling is that?
>
> Defendant Dennis: The ruling in respect to denying the defense even a reasonable opportunity to present its motions and the grounds for the motions.
>
> The Court: You see, you are not familiar with these legal matters, Mr. Dennis.
>
> Defendant Dennis: I am familiar, your Honor, with a number of things on which I would like to speak very briefly.
>
> The Court: Well, go ahead. This is your time.
>
> Defendant Dennis: I must say, the first thing that must be noted in respect to directing counsel to conclude any arguments or proffer any motions by 4:30 this

afternoon makes a mockery of justice, because, by this ruling and by the injunction that defense must produce its first witness by tomorrow morning, your Honor has stated, in effect, that irrespective of what motions we offer that you cannot be convinced that there is no prima facie case.

The Court: Let me ask you a question——

Defendant Dennis: And, moreover, that you have prejudged this case.

The Court: Let me ask you a question: Do you conceive it possible that the proof in support of a given charge might be so clear that argument of its legal insufficiency might not be helpful? Does that strike you as possible as a theoretical concept?"

Subsequently the Court asked Mr. Dennis what, in his opinion, was lacking in the proof adduced by the Government necessary to sustain a charge. To this Mr. Dennis replied (Tr. 6050):

> Your Honor, in respect to that, the first thing I would say is that we in the United States should never permit what is being perpetrated here, where you have a federal police interpretation of what we defendants think and believe in."

Thereafter, in the course of his argument, Mr. Dennis made the following comment (Tr. 6053-6054):

> "And it is highly reminiscent in many respects of the Reichstag fire trial and of the efforts of reactionaries in this and other countries to outlaw the Communist Party as a prelude to trying to drag our nation along the path of war and fascism. And however much you may think or agree or disagree with this I would strongly urge as a matter of most elementary justice and not to deprive the defense of some of the remnants

of due process of law that we should be afforded an opportunity of a few days at least to prepare our motions, our argumentation."

Following this last statement, Mr. Crockett arose and the following occurred (Tr. 6054):

"Mr. Crockett: If the Court please——

The Court: Yes, Mr. Crockett.

Mr. Crockett: —I assume perhaps correctly that it would be to no avail to ask the Court to grant a reasonable time to prepare——

The Court: It would be without avail to ask me to give any time for the making of these motions. They are to be made this afternoon.

Mr. Crockett: That is why I made the assumption.

The Court: Well, you put that word 'reasonable' in there. I don't (think) the request for any time now is reasonable. That is why I denied the application.

Mr. Crockett: I think, your Honor, that the defendants, as well as myself, and other counsel began this trial with certain illusions that have been shattered because of the prejudicial actions of the Court."

When the Court suggested that Mr. Crockett should be more temperate, the following occurred (Tr. 6055):

"Mr. Crockett: I suggest that this latest ruling of the Court merely confirms all of the prejudicial rulings that have been made in the course of this trial. I suggest that during the course of this trial it has actually been possible and I have heard spectators making the Court's rulings before the Court himself made the ruling.

The Court: It is very interesting.

Mr. Crockett: Because the Court's bias was so obvious that it was possible——

The Court: That is an insulting comment you are making, Mr. Crockett, a very insulting comment."

XXIII.

On May 24, 1949, during the direct examination of the witness John Gates, which was conducted by Mr. Sacher, the Court sustained an objection made by the United States Attorney to a question asked of the witness, inquiring whether he ever had to pay the fine or serve the sentence imposed in connection with the witness' conviction on a certain charge. The Court cut off an attempted argument by Mr. Sacher in opposition to the ruling with the direction that it did not desire argument on the matter. Thereupon, Mr. Gladstein interjected a statement which (1) wilfully misstated the evidence by referring to the "conviction" of the witness Nicodemus in the presence of the jury when, in fact, he knew that Nicodemus had been found not guilty and that the Court had so ruled; (2) improperly characterized the Court's correction of the injustice to the witness Nicodemus; and (3) insinuated that the Court was guilty of impropriety and partiality in sustaining the objection. The incident was as follows (Tr. 6271-6272):

"Mr. Gladstein: May I interrupt, your Honor, to object to the Court's ruling that prevents the establishment by testimony of the ultimate outcome of this matter, and I submit that a strange contrast is afforded by the Court's insistence, for example, to which we have no objection—but the Court's over-insistence on pursuing to its final conclusion the arrest and conviction of the witness Nicodemus, concerning which it would seem to me——

The Court: You will please desist from further argument, Mr. Gladstein.

Mr. Gladstein: Very well."

XXIV.

On May 25, 1949, in the course of the direct examination of the witness John Gates, which was being conducted by Mr. Sacher, an article written by the witness in 1938 was offered in evidence. Objection was made by the United States Attorney, which objection was sustained by the Court. Thereupon the following occurred (Tr. 6460-6462):

"Mr. Gladstein: Your Honor, may I ask that the Government be required to state the grounds for its objection to a document that this man wrote twelve years ago before he ever knew that there would be an indictment and when he expressed his political views on the very issues involved in this case? May I know what the legal ground is by which a man is prevented from showing his intentions, his state of mind——

The Court: You remember my instruction about these arguments?

Mr. Gladstein: I desire to ask the Court to require the Government to explode this mystery whereby with the mere words 'I object' they can shut off the right of a man to show——

The Court: You may think that this matter of argument is helpful. It is certainly not helpful to me. Now you have requested, and you could have requested without those comments and that argument that the Government be required to state the grounds of its objection. That application is denied.

Mr. Gladstein: Your Honor, we have been sitting here for months——

The Court: Now please don't start this argument over again.

Mr. Gladstein: May I——

The Court: I have no desire to hear it. If you have some motion, make it. If you have some objection, state it and I will rule on it.

Mr. Gladstein: Well, I do object to a ruling which prevents a man from summoning to his defense the deeds and the acts of his life committed long before there was any question about it——

The Court: I do not really think, Mr. Gladstein, you have any right to proceed with that form of argumentative matter when I have forbidden it. Now you have already got a very substantial record of disobedience here. You may have an additional record now if you choose to go on.——

Mr. Gladstein: I have no desire to disobey the Court's admonitions.

The Court: But you have.

Mr. Gladstein: I do have a desire, your Honor, to bring before the jury the opening pages of the book——

The Court: Well, I think, Mr. Gladstein, this sort of argument is the very sort of thing that you are not entitled to bring before the jury and I forbid it.

Now as I said before, if you choose to pile up the record of these things against yourself, you may go on.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: Otherwise you will sit down.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: Very well."

XXV.

On May 26, 1949, in the course of direct examination of the defendant John Gates by Mr. Sacher, objection was made to a question asked of the witness, and was sustained. Mr. Sacher then asked the Court for the theory upon which the objection was sustained. The Court replied that it did not desire argument. Mr. Gladstein arose and asked the Court to inquire of the United States Attorney as to what legal grounds the United States Attorney urged

in support of his objection. The Court refused to do this. Mr. Sacher then put another question to the witness, to which objection was made and sustained. Mr. Sacher angrily stated (Tr. 6532):

> "I don't think there is a soul in this courtroom who knows what the words 'Past sins must be paid for now' mean unless this witness is permitted to say what he was talking about.
>
> The Court: Now——
>
> Mr. Sacher: And what is the use of laying it before the jury?
>
> The Court: —you realize that your action now is deliberately contemptuous?
>
> Mr. Sacher: It is not deliberately contemptuous. I am just bewildered, your Honor.
>
> The Court: I have told you not to argue these matters and I really am quite at a loss to understand why you so flagrantly and deliberately and persistently disobey my instruction. Probably it is because I don't shout at you, but I don't like to do that."

XXVI.

On June 2, 1949, in the course of the direct examination of the witness John Gates, which was being conducted by Mr. Sacher, a pamphlet written by William Z. Foster was offered in evidence and objection by the United States Attorney was sustained by the Court. Thereupon, Mr. Gladstein moved that the Court strike out testimony of all Government witnesses dealing with the claim that the Communist Party or its members taught and advocated that force and violence should be used in the event that the United States became involved in a war. This motion was denied by the Court, but Mr. Gladstein continued his argument. The following then occurred (Tr. 6838):

"The Court: You know, Mr. Gladstein, that I have indicated my desire not to hear arguments unless I desire them.

Mr. Gladstein: I do, your Honor, but I thought that that was limited simply to hearing argument. Now it seems to me, and I submit, that the Court is now making it plain that it no longer wishes to hear evidence from the defendants, and that began to be true when the defense began to put in its case."

XXVII.

On June 3, 1949, in the course of the cross-examination of the defendant John Gates, he refused to answer a question after being directed to do so by the Court, and he was sentenced for contempt. Immediately upon the pronouncement of the judgment of contempt, Messrs. Gladstein, Sacher, Crockett, Isserman and McCabe, and the remaining ten defendants, simultaneously arose in the courtroom. The defendant Henry Winston and the defendant Gus Hall, each taking several steps past the end of the counsel table and toward the bench, began in a disorderly and threatening manner to shout at the Court in loud, angry voices. They were adjudged guilty of contempt for their misconduct.

The situation at that time became so serious that it was necessary to send for additional Deputies Marshal, who were then in other courtrooms in the building, to assist in restoring order and to prevent any further incidents in the courtroom.

The Court suggested to Mr. Gladstein that it would be "prudent if the defendants resumed their seats." Mr. Gladstein rejected the Court's request, saying (Tr. 6975), "Well, your Honor, may I first have a ruling on the right of the witness to complete the record of his invocation of his rights under the Fifth Amendment," and continuing to argue thereafter. Mr. Gladstein did not instruct his

clients or any of their co-defendants to take their seats, and the defendants gave no heed to the Court's direction. Messrs. Sacher and Isserman also made statements to the Court, but neither of them made any attempt to assist the Court in restoring order in the courtroom, nor did Messrs. Crockett and McCabe. After the defendant Dennis had made statements to the Court, he turned to his co-defendants and stated that he urged "upon my co-defendants that they at this time do not speak—they can act as they see fit. I urge them not to call for any provocation" (Tr. 6977). Only then did the ten co-defendants resume their seats in the courtroom and order was restored.

XXVIII.

On June 7, 1949, Mr. Sacher objected to a question asked by the United States Attorney during the cross-examination of the defendant John Gates. Despite the fact that the Court had frequently in the past directed counsel not to argue without leave, Mr. Sacher commenced arguing, saying (Tr. 7123):

> "I should like to observe that the defendant is being tried——"

The Court interrupted him with the suggestion that he desist. Nevertheless, Mr. Sacher in a loud voice commenced to shout (Tr. 7123):

> "Well, your Honor, I submit that——"

When the Court directed Mr. Sacher to stop shouting, Mr. Sacher said (Tr. 7123):

> "I am not shouting and I resent the filling of the record with statements about my shouting when all I am doing is speaking vigorously, and that, I think, is part of the function of an advocate."

The Court commented that Mr. Sacher was one of the most vigorous speakers it had ever heard. Mr. Sacher continued to argue, saying (Tr. 7123-7124):

> "That may be, but I say to your Honor that I resent this trying the defendant for things that came 15 years or 18 years ago and I submit that what he is being tried for is what is charged in the indictment between the years April 1, 1945 and July 20, 1948, and I also wish to say to your Honor that I don't think——"

He finally subsided, but only when the Court advised him that he was proceeding in direct and wilful disobedience of the direction of the Court.

XXIX.

On June 9, 1949, the defendant John Gates was asked on cross-examination whether he had ever been convicted of a crime. He commenced to shout, saying (Tr. 7363):

> "I am not making a long explanation. Let me answer. I did testify on direct examination—why don't you read the transcript? This is repetitious. I testified on the direct examination as to what I was convicted of, and Mr. McGohey knows it very well——"

The United States Attorney then requested that the record show that the witness had been shouting when he made the last answer. Thereupon Mr. Sacher stated (Tr. 7364):

> "May the record show that the witness is being crucified unnecessarily with interrogations to which he has truthfully answered already."

When the Court directed that this remark of Mr. Sacher be stricken, Mr. Crockett arose and, in the presence of the jury, said (Tr. 7364):

> "May the record show that this is the fifth day of the witness' imprisonment in jail."

The Court remarked that it would not be provoked into an answer the Court might later regret. Mr. Sacher then stated (Tr. 7364):

> "I object to that. We are the ones who are being injured and we are not being permitted to complain of the injury that is being inflicted on us. I think in the present state of the record, your Honor, it ill becomes anybody here to claim any martyrdom."

XXX.

On June 30, 1949, in the course of the cross-examination of the defendant Gilbert Green by the United States Attorney, he was interrogated concerning a series of false statements in an application which he had prepared. When pressed for an answer concerning one of the false statements, the witness became evasive. An objection by Mr. Isserman was overruled. Mr. Sacher, who did not represent the witness and who was not participating in the examination of him, arose and interjected, as an attempted diversion (Tr. 8895):

> "I would like to quote the Court and say 'This is pretty small pickings'."

XXXI.

On August 1, 1949, the witness Yolanda Hall, called by the defense, was asked a question on cross-examination and then the following transpired (Tr. 11,031):

"Mr. Isserman: I object to that as argumentative. It is not based on the facts in evidence as testified by this witness.

The Court: Mr. Isserman, do you remember my admonition, that when counsel objects, counsel is merely to state 'I object'? You have violated it several times this morning. Did you forget?

Mr. Isserman: I am reminded of it now. It is a habit that goes back over 25 years. It is hard to give up that habit, which your Honor has undoubtedly engaged in yourself.

The Court: Every time you do that your action is contemptuous and direct, I think, wilful and deliberate disobedience of my command.

Mr. Isserman: I must object to your Honor's characterization of my conduct.

The Court: I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous.

Mr. Isserman: I must object to your Honor's finding.

The Court: Very well."

Not much later, during the cross-examination of the same witness, at the same session of the court, she refused to answer a question (Tr. 11,070). At this juncture the following occurred (Tr. 11,071-11,073):

"The Court: Do you remember the oath you took when you were sworn as a witness?

Mr. Isserman: I object to that question.

The Witness: Yes.

The Court: Overruled.

Q. Now, before you——

Mr. Gladstein: May I object to the Court's—the inference from the Court's statement?

The Court: Your objection is noted. It is overruled.

Mr. Gladstein: Because the Court's statement has nothing to do with that.

The Court: I will hear no argument.

Mr. Gladstein: I want to note my objection on the record.

The Court: You have noted it. Sit down.

Mr. Gladstein: I object to that and ask your Honor to admonish the jury——

The Court: Will you sit down or must I call an officer to put you down? I will have no more interruptions on cross-examination. Your field day is over.

Mr. Gladstein: I resent your Honor's remarks as——

The Court: Mr. Marshal, will you please—all right, I see you sat down by yourself.

Mr. Isserman: May I object to your Honor's remarks and ask for a mistrial on the basis of your Honor's remarks?

The Court: Denied.

Defendant Dennis: Your Honor——

The Court: I want no argument, Mr. Dennis.

Defendant Dennis: May I make an inquiry of the Court?

The Court: You may.

Defendant Dennis: I would like to know whether the ruling and remarks of the Court are directed to the defendants and counsel as to prejudice our case before the jury?

The Court: They are not. I have heard enough from Mr. Gladstein. I have heard enough interruptions and suggestions to witnesses and so on, and I will have no more interruptions of cross-examination. Now, that is final and that is over for this trial.

Mr. Sacher: I wish to object to your Honor's remarks as being wholly improper and unjustified and designed to prejudice the jury against the defendants.

The Court: Your motion is denied.

Defendant Dennis: I just wish to state and very emphatically, your Honor, that for all intents and purposes the defendants are deprived of counsel and deprived of what is set forth in the Sixth Amendment to the Constitution."

XXXII.

On August 3, 1949, during the direct examination of the witness Geraldyne Lightfoot by Isserman, she was asked a question to which the Government objected. The Court undertook to elicit the information sought by a direct question. In order to forestall an answer, Messrs. Isserman and Gladstein provoked a disorderly disturbance and succeeded in preventing an answer to the question, as follows (Tr. 11,269-11,274):

"The Court: Mrs. Lightfoot, in this matter of the strategy of the workers, did you discuss the dictatorship of the proletariat, imperialism, and just and unjust wars, and things of that kind, or were they not mentioned?

Mr. Isserman: I object to the question.

The Court: Overruled.

The Witness: Under topic 3—under topic C——

The Court: You will answer that question yes or no or state that you cannot answer it.

Mr. Gladstein: I object to the Court's tone and manner of badgering the witness.

The Court: There is nothing about my tone, and you will please sit down.

Mr. Gladstein: I desire to make an objection.

The Court: Mr. Marshal, will you just——

(To the reporter) Read the question to the witness.

We will have no more monkey business here.

Mr. Gladstein: I object to the ruling.

Mr. Isserman: I object to the Court's remark.

The Court: You will sit down, Mr. Gladstein.

Mr. Isserman: And I want to register an objection to the Court's ruling.

The Court: Very well.

Mr. Isserman: As prejudicial to the conduct of the case and to the defense and making the defense impossible.

The Court: When I desire to ask a question, I am going to ask it. I am through with the interference of counsel.

Now go ahead and read the question, Mr. Reporter.

Mr. Isserman: May I ask the Court a question?

The Court: You may not.

(Question read.)

Mr. Isserman: I object to that question.

The Court: Overruled.

A. Under C I discussed——

The Court: Mrs. Lightfoot, did you hear me tell you to answer that question, either that you did discuss those subjects or that you did not discuss those subjects? Now, which was it? You did discuss them or you did not discuss them?

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Gladstein: Your Honor——

The Court: Overruled. I don't want to hear anything from you, Mr. Gladstein.

The Witness: The way that the question was—I heard the question. It says——

The Court: Then you will answer it the way I tell you to, Mrs. Lightfoot. Now, did you discuss those subjects or did you not?

The Witness: The question includes 'things of that kind,' and——

The Court: Then I will take out 'things of that kind.'

Did you——

The Witness: May I hear the question?

The Court: I will give it over again.

Did you in that lecture discuss, when treating the subject of the Strategy of the Workers, the Dictatorship of the Proletariat, Imperialism, Just and Unjust Wars, or any of them?

The Witness: Well, were they mentioned during the course of that discussion, is that what you are asking me?

The Court: Well, I suppose that word 'discuss' has some peculiar meaning in the Communist Party—

Mr. Isserman: I object to that characterization.

The Court: I will reform my question.

Did you mention to the class in that lecture the subject of the dictatorship of the proletariat?

The Witness: I didn't mention it at that lecture—

Mr. Isserman: Just a minute. First of all I wish to object to your Honor's question——

The Court: Mr. Isserman, I am not going to have any interference here. Now you will just go over

there and sit down and then you can say what you want to say afterwards.

Now, Mr. Marshal, just escort Mr. Isserman over to the seat.

Mr. Isserman: I would like to make an objection to your Honor's question. Am I allowed to do it?

The Court: You have made it. Go back and sit down there.

(The marshal escorts Mr. Isserman to the seat.)

(Mr. Isserman rises.)

Mr. Isserman: Well, I rise now to object to your Honor's question.

The Court: Overruled.

(Mr. Isserman is seated.)

The Court: Now, Mrs. Lightfoot, you will give me a direct and responsive answer to that question. In that lecture did you discuss the subject—did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Marshal, will you show Mr. Isserman to his seat?

Mr. Isserman: May I not stand at this point?

The Court: You will sit right down. I have had enough contemptuous conduct from you and I am not going to have any more.

Mr. Isserman: I am not aware of any contemptuous conduct.

The Court: Well, you will be aware, all right.

Mr. Isserman: I would like to object to your Honor's remark and I move for a mistrial because your Honor has made the defense impossible.

The Court: Mr. Marshal, get busy.

(Mr. Isserman sits down.)

The Court (to witness): Now answer that question.

Mr. Isserman: I object to that.

The Court: Overruled.

The Witness: The question—may I hear the question again now; after so much I do not remember it.

The Court: The reporter will read it—or I will ask you again:

In that lecture did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

A. In the beginning of that——

The Court: All right, I sustain the objection to that question. We will have no more of it.

Go ahead with your next question, Mr. Isserman."

Having successfully prevented the Court from getting an answer, Mr. Gladstein nevertheless then attacked the Court, as follows (Tr. 11,275-11,276):

Mr. Gladstein: And that includes the badgering tone and the bullying and blustering tone towards the witness.

The Court: Oh, there is nothing about my tone that is at all noisy or loud.

Mr. Gladstein: No witness can retain composure and dignity under the attack which your Honor has just levied during the last half hour. I assign it as misconduct.

The Court: I consider what you said as absolutely contemptuous, Mr. Gladstein. Now you can keep it up all you want but you do it against my orders.

(Mr. McGohey rises.)

The Court: Yes, Mr. McGohey; do you desire to say something?

Mr. McGohey: I desire to say that certainly your Honor's tone was not loud; there was nothing that I

observed in the nature of badgering, and I suggest that now we be allowed to go on with the trial.

The Court: Yes.

Mr. Isserman: And I object to Mr. McGohey's remarks as not being in accord with the facts.

Mr. Gladstein: I would like to say that they are directly contrary to the facts, and I am willing, if your Honor will permit, to have a poll taken of the members of the jury and the people of the press and the people in attendance in this courtroom at this moment as to——

The Court: Mr. Gladstein, you know earlier in this trial I found that no matter how much leeway I gave counsel they just tried to put the whole administration of justice into disrepute by just the sort of conduct that you are now indulging in, and I tell you now in the most emphatic way that I know without raising my voice, that you are to desist from that. It is wholly improper, as you must know, to talk about having the people in the courtroom polled and having the jury polled as to whether a statement made by somebody is accurate or not. That is all right perhaps in some place but it is not right or proper in a courtroom, and you must know that, so please let the matter go on."

Order had scarcely been restored, when the Court sought to elicit certain information from the witness, which was called for by a question asked by Mr. Isserman. Again Messrs. Isserman and Gladstein successfully prevented the Court from obtaining an answer, as follows (Tr. 11,281-11284):

"Q. At whose instance did you give that course?

A. That was a course given——

The Court: Why don't you just give the person's name. Who was it that told you to give that course?

Mr. Gladstein: Well, your Honor, I object to that. It may not have been a person.

The Court: Overruled.

Mr. Gladstein: I don't think you should direct the witness that way.

The Court: Read the question to the witness, please, Mr. Reporter, and see if we can stop this circumlocution.

(Question read.)

A. This course was given——.

The Court: Now, Mrs. Lightfoot, you are going to say at whose instance it was. That means giving the name.

Mr. Isserman: I want to object to that question.

Mr. Gladstein: I want to object to the Court making a direction to this witness and pointing his finger at the witness in an intimidating way. I assign that as misconduct, your Honor.

The Court: Mr. Gladstein, you are perfectly wonderful the way you make these things up.

Mr. Gladstein: I beg your pardon?

The Court: Oh, you go ahead now.

Mr. Gladstein: Does your Honor deny that you——

Mr. McGohey: Oh, if the Court please, can't we get on with the trial and stop this nonsense?

The Court: I raised my finger, and the rest of it is sheer imagination but done deliberately. I know what you are up to, Mr. Gladstein. You and your colleagues here are trying, and again and again have made positively false statements in the record for the purpose of making me appear to be

biased and prejudiced and to do the wrong things, that I am not doing. However, I am not going to sit silently by and have you do that.

Mr. Gladstein: I deny that part of your Honor's statement which charges me with making false statements.

The Court: I happen to be in charge of this case and I happen to be in charge of this court.

Mr. Gladstein: I know, your Honor, but I wish the record to show that I deny that part of your Honor's statement that charges me or my colleagues with any false statements, and I not only agree with but affirm that part of your Honor's statement which is to the effect that your Honor is biased and prejudiced.

The Court: Did I say that? I say you said so very often, and at your table things seem to be unanimous on that subject. You have attacked me again and again and I suppose you will continue to do it.

Now, go ahead, Mr. Isserman.

Mr. Isserman: I join in Mr. Gladstein's denial and object to your Honor's remarks.

The Court: Yes.

Do you desire me to have the rest of the counsel give their views, too, Mr. Isserman?

Defendant Dennis: Your Honor——

The Court: You may add your bit, Mr. Dennis.

Defendant Dennis: No. I arise to make a motion for a mistrial first on the basis of the hostile and belligerent and disrespectful attitude of the Court to this witness, which interferes with the testimony and the presentation of our case.

The second part of my motion is in connection with the ruling of the Court which deprives all

counsel frequently not only of stating the grounds of their objection, but even to rise to move an objection.

And, thirdly, I must say that the motion for a mistrial should be granted because you have placed counsel and the defendants under surveillance of this Court, and the case is actually proceeding now in that way and proceeding by a marshal—in a martial atmosphere.

The Court: Your motion is denied, Mr. Dennis.

Defendant Dennis: For those and other reasons I move for a mistrial.

The Court: The motion is denied.

Go ahead, Mr. Isserman."

XXXIII

On August 5, 1949, shortly after the cross-examination of the witness Robert Manewitz by the United States Attorney began, he was asked when he had resumed activity in the Young Communist League. Thereupon, the following occurred (Tr. 11,577-11,578):

"Mr. Sacher: I object to this line of questioning.

The Court: Overruled.

Mr. Sacher: I was kept from——

The Court: I will have no interruption of the cross-examination; that is over.

Mr. Sacher: Even if it is justified?

The Court: I do not desire argument from you, Mr. Sacher—nor impertinence either."

XXXIV

On August 10, 1949, in the course of the direct examination of the defendant Robert Thompson, the Court sustained an objection to a question asking the witness to

define Marxism-Leninism. Mr. Gladstein then proceeded to argue against the Court's ruling despite the Court's direction that there should be no argument, as follows (Tr. 11,818-11,819):

"Mr. Gladstein: May I call your Honor's attention to the state of the record——

The Court: No, I don't want to hear any argument about it.

Mr. Gladstein: But, your Honor——

The Court: I will hear what this witness directed to be taught, resolutions that he voted for setting up the schools and what was to be taught in the schools, and when the time comes, if it does, for him to testify what he taught and in particular schools, within certain limitations I will permit. I do not conceive the question before us to be one which makes that question relevant.

Mr. Gladstein: Would your Honor notice that in the record your Honor permitted the witness Budenz to be asked precisely that question, and to give an answer to it?

The Court: You know I just told you I didn't desire to hear argument but you wanted to get that point in and so again you have become contemptuous. Go ahead.

Mr. Gladstein: May I ask the witness the very same question that Mr. McGohey asked, your Honor?

The Court: I tell you, Mr. Gladstein, again, I do not desire to hear argument.

Mr. Gladstein: I do not want to argue but I am asking permission——

The Court: No, you are arguing, and you are again contemptuous."

XXXV

On August 26, 1949, during the direct examination of the witness Edward Strong, called by the defense, an objection was sustained to a question asked of the witness by Mr. Gladstein. The Court stated that it wanted no argument, and Mr. Gladstein then commented upon the ruling of the Court, in a private aside to the jury, as follows (Tr. 13,169):

"The Court: It is all right. I don't want argument, Mr. Gladstein.

Mr. Gladstein: That is no——

Mr. McGohey: What was that?

Mr. Gladstein: I was talking to myself.

Mr. McGohey: Were you talking to yourself or part of the jury?

The Court: I did not hear what was said.

Mr. McGohey: I heard.

Mr. Gladstein: I am willing to say what I said.

Mr. McGohey: Say it.

The Court: What did you say?

Mr. Gladstein: Your Honor is asking me and I am replying because your Honor asked, and not because Mr. McGohey directed.

Your Honor said you did not want any argument, and I said under my breath, 'Well, that is no secret.'

The Court: I think that is an extremely improper thing for you to do, and to do as you are leaning right on the rail of the jury box there, and I admonish you not to do that again."

XXXVI

On August 29, 1949, during the direct examination of the defense witness Max Weiss, Mr. Isserman sought to elicit testimony concerning the disaffiliation by the Communist Party from the Communist International. When

the Government objected, the Court heard argument by Mr. Isserman and by the United States Attorney and then overruled the Government's objection (Tr. 13,334-13,337). After some testimony on the subject, the Court sustained an objection to a question concerning a statement at a convention, and Mr. Sacher interjected himself and implied a partiality in the Court's rulings in permitting argument.

In doing so, he again persisted in arguing despite the Court's express statement that it would not hear him (Tr. 13,338):

"Q. Either at the National Committee meeting which you attended in 1940 or the convention you attended in 1940, was there any statement made by anyone that the decision to disaffiliate was one that was a Comintern decision?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: May I be heard on that, your Honor?

The Court: No.

Mr. Sacher: In view of the fact that Mr. McGohey——

The Court: I will not hear you.

Mr. Sacher: But Mr. McGohey was permitted to make a statement concerning this.

The Court: Mr. McGohey responded to a question from me and further asked leave to address the Court which I permitted. I do not desire to hear you.

Mr. Sacher: I have asked your Honor for leave.

The Court: Please be silent, Mr. Sacher. Again you are deliberately contemptuous.

Mr. Sacher: I am asking an opportunity to reply to Mr. McGohey.

The Court: Go ahead, Mr. Isserman."

XXXVII

On September 9, 1949, during the direct examination of the defendant Carl Winter, Mr. Crockett asked him a question concerning the Black Legion, to which objection was made. The Court sustained the objection and at the same time stated that it did not want argument. Nevertheless, the following occurred (Tr. 13,893-13,894):

Mr. Crockett: May I point out——

The Court: I don't want further argument.

Mr. Crockett: I wanted to say——

The Court: I think you are in contempt now. Don't do it. I will not have any more. The time for that is over.

Mr. Sacher: I wish to object to your Honor's characterization of Mr. Crockett's conduct as contempt.

The Court: You may object. You have done enought of it yourself.

Mr. Sacher: I wish to object to that characterization. I think the record will prove, I think your Honor has sought to prejudice this jury sufficiently against counsel.

The Court: You are deliberately contemptuous again.

Mr. Sacher: I am not. I wish to defend the rights of my clients and the right to advocate their cause, and I resent the constant obstruction of that effort on the part of the Court.

The Court: There has been no obstruction of effort, but I will have order by the attorneys here, and I will enforce it with every power at my disposal.

Mr. Crockett: May I ask if the Court is suggesting there has been any disorder by the attorneys?

The Court: You insisted upon continuing arguing only a moment ago and I told you to stop.

Mr. Crockett: I was not arguing.

The Court: That is what you now say but every time you said it you kept it up. Let us stop now and go on with the questions."

XXXVIII

On September 14, 1949, in the course of the cross-examination of the defendant Carl Winter, the Government offered a certified photostatic copy of a birth certificate in evidence, to which Mr. Crockett objected. The Court granted leave to him to state the grounds of his objection. However, in place of stating legal grounds for his objection, he argued, as follows (Tr. 14,219-14,220):

"Mr. Crockett: First, I submit that there is an invasion of the family relationship. This refers to a situation which has no relation whatever, and certainly should not be submitted in this court. Certainly I think it is apparent from the exhibit itself that my client's signature appears nowhere on it. There is nothing on that or the original, and I submit that it is taking unfair advantage of a man to show him what——

The Court: Are you making a legal argument or a speech that we have had here so often?

Mr. Crockett: Under the circumstances I decline to state any further grounds. There is no point in talking to a Court, when I would like to state the grounds, when it is apparent that his Honor's mind is closed to any grounds that I might state."

Thereupon the Court ruled that only a portion of the exhibit was relevant and said (Tr. 14,222):

"I shall receive the name and the address, and so that there may be no misunderstanding about them I shall read into the record, rather than permitting the

exhibit to be handed around to the jury, the following:

"'Father of the child, full name, Carl Winter, Color or race, Caucasian. Age at time of this birth, 35. Length of residence in California, zero years, three months, zero days. Birth place, Pennsylvania. Usual occupation lecturer. Industry or business: self.'"

At this point Mr. Sacher said (Tr. 14,222-14,223):

Mr. Sacher: May I call your Honor's attention to the fact that you indicated there were just three items, and that Mr. McGohey limited it to three items? You have read about six now.

The Witness: May I say, your Honor——

Mr. Sacher: Just the name and address, as I recall it.

The Witness: May I address the Court?

Mr. Sacher: Name, address, and date.

Mr. Crockett: If the Court please——

The Court: Is this additional part that I read very objectionable to you?"

At this juncture, Mr. Crockett made a statement which, by its sarcastice emphasis on the word "seemingly," accused the Court of intentionally reading more of the exhibit than should have been read, as follows (Tr. 14,223):

"Mr. Crockett: If the Court please, in view of your Honor's seemingly unintentional reading more than——

The Court: Mr. Crockett, that is one of the most contemptuous things that has occurred at this trial.

Mr. Crockett: I am trying——

The Court: And for that you will be brought to justice.

Mr. Crockett: I am trying to say, with the Court's permission——

The Court: You just bear that in mind, Mr. Crockett.

Mr. Crockett: Your Honor, may I——

The Court: You say I seemingly do something and accuse me of deliberately evil motives here. That is something that I cannot pass over and I shall not. I now adjudge you in contempt for that."

XXXIX

At the same session of the Court, the following occurred during the cross-examination of the defendant Carl Winter concerning his use of an alias (Tr. 14,240-14,241):

"Q. Now I show you what purports to be the Los Angeles Extended Area Telephone Directory of March 1943, issued by the Southern California Telephone Company and I direct your attention to page 202——

Mr. Sacher: Just a moment. I object to that question.

The Court: Overruled.

Mr. Sacher: I would like to be heard if I may.

The Court: I don't desire to hear you, Mr. Sacher.

Mr. Sacher: Will there come a day, your Honor, when you will hear us?"

XL

On October 4, 1949, the day after the Court had filed an opinion denying the request of the defendant Benjamin J. Davis, Jr., to discharge Mr. Sacher as his counsel,

lengthy argument was made by Mr. Davis, Mr. Sacher, Mr. Isserman, Mr. McCabe, Mr. Crockett, Mr. Gladstein, and Mr. Dennis, that the Court reconsider its ruling. Immediately following the statement that the Court adhered to its ruling, Mr. Dennis moved for a mistrial. In stating the grounds Mr. Dennis, without any foundation, accused the Court of racial bias, saying (Tr. 15,293-15,294):

> "In light of the fact that the Court has recognized my inalienable constitutional rights and granted me, a white Communist, a defendant, who is not a lawyer, the right to conduct my own defense, its denial of this right to Mr. Davis, a Negro Communist, a defendant who happens to be a lawyer, can only be construed as an act of gross discrimination and an affront to the Negro people."

Dated: October 14, 1949.

HAROLD R. MEDINA,
U. S. D. J.

Affidavit of Margery De Leon.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Appellee, against HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. MCCABE, ABRAHAM J. ISSERMAN, and EUGENE DENNIS, Appellants.	C 131/36

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARGERY DE LEON being duly sworn under oath deposes and says that she has compared the attached copies of the transcript of the proceedings in the trial of the United States of America v. William Z. Foster, et al., No. C 128/87, held on October 14, 1949 before Judge Harold R. Medina, with the original reporters' transcript of that day which includes the following pages 16,113 to 16,157 inclusive and that the copy of the transcript hereto attached is a complete, true and accurate copy of the transcript of said date.

MARGERY DE LEON.

Sworn to before me this
28th day of November, 1949.

CELIA GELMAN
Notary Public, State of New York
Qualified in Bronx County
No. 03-1400460
Cert. filed with New York County Clerk
New York and Bronx County Registers
Term Expires March 30, 1951

Extract from Stenographer's Minutes
(United States v. Foster et al.).

UNITED STATES OF AMERICA vs. WILLIAM Z. FOSTER, et al.	(Tr. 16,113)

New York, October 14, 1949,
9:30 a. m.

(The clerk opened the Court at 10.09 a. m.)

The Court: Now we have simply declared court in session here and we will now take a recess during the deliberations of the jury. This is a mere formality.

Have you something to tell me, Mr. Gordon?

Mr. Gordon: Perhaps your Honor would like to note on the record the presence of counsel and the defendants, as you usually did.

The Court: Well, I shall be very glad to do that——

Mr. Gordon: I believe they are all here.

The Court (continuing): If I find my little piece here. Or has that been lost? Well, I have a copy of it.

Let the record show that the defendants are present and the attorneys for the defendants and for the Government are present.

Now is there any other announcement that anyone would care to have me make?

Mr. Crockett (to the clerk): Did the Judge get those corrections for the record?

(Tr. 16,113-A)

The Clerk: Yes.

Mr. Crockett: Very well.

The Court: I think that is all then. We will take a recess.

The Clerk: The court will now stand in recess while the jury continues their deliberations.

(Recess.)

(Tr. 16,114)

(At 11.10 a. m. a note was sent to the Court.)

(At 11.20 a. m. the following proceedings occurred in the courtroom:)

(The clerk confers with the Court.)

The Court: You may bring in the jury.

(At 11.25 a. m. the jury entered the courtroom.)

The Clerk: Shall I proceed, your Honor?

The Court: Yes.

The Clerk: Will the jurors kindly answer as their names are called.

Mrs. Thelma Dial.

Juror: No. 1: Here.

The Clerk: Russell Janney.

Juror No. 2: Here.

The Clerk: Mrs. Ida F. Howell.

Juror No. 3: Here.

The Clerk: Miss Kathryn E. Dunn.

Juror No. 4: Here.

The Clerk: Mrs. Jane Schultz.

Juror No. 5: Here.

The Clerk: Mrs. Lillian Berliner.

Juror No. 6: Here.

The Clerk: Patrick S. Reynolds.

Juror No. 7: Here.

The Clerk: Henry Eisler Allen.

(Tr. 16,115)

Juror No. 8: Here.

The Clerk: Mrs. Lillian Schlesinger.

Juror No. 9: Here.

The Clerk: James Frederick Smyth.

Juror No. 10: Here.

The Clerk: Mrs. Carrie L. Robinson.

Juror No. 11: Here.

The Clerk: And Mrs. Gertrude Corwin.

Juror No. 12: Here.

The Clerk: Madam Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you?

The Foreman: The jury finds each of the defendants guilty.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you find each of the defendants guilty, and so say you all?

The Court: I direct that the jury be polled.

(Tr. 16,116)

Mr. Gladstein: Your Honor, I would ask that the jury be polled separately and individually——

The Court: Yes, I direct that the jury be polled separately as to each defendant.

The Clerk: Mrs. Thelma Dial, you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged.

Juror No. 1: Yes.

The Clerk: Russell Janney, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 2: I do.

The Clerk: Mrs. Ida F. Howell, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 3: I do.

The Clerk: Miss Kathryn E. Dunn, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr. (Tr. 16,117), Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 4: I do.

The Clerk: Mrs. Jane Schultz, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 5: I do.

The Clerk: Mrs. Lillian Berliner, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 6: I do.

The Clerk: Mr. Patrick S. Reynolds, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 7: I do.

The Clerk: Mr. Henry Eisler Allen, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green (Tr. 16,118) Carl Winter and Gus Hall guilty as charged?

Juror No. 8: I do.

The Clerk: Mrs. Lillian Schlesinger, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 9: I do.

The Clerk: Mr. James Frederick Smyth, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 10: I do.

The Clerk: Mrs. Carrie L. Robinson, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

Juror No. 11: I do.

The Clerk: Mrs. Gertrude Corwin, do you say you find the defendants Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter and Gus Hall guilty as charged?

(Tr. 16,118-A)

Juror No. 12: I do.

(Tr. 16,119)

The Court: Very well. I have already expressed to you——

Mr. Gladstein: Your Honor, may I interrupt for a moment?

The Court: Yes, you may.

Mr. Gladstein: Would your Honor inquire of the Madam Forelady whether the jury in deliberating considered the evidence separately and individually with regard to each defendant?

The Court: I see no occasion to do that. What do you say, Mr. McGohey?

Mr. McGohey: There is certainly no basis for it. Your Honor's instruction was perfectly clear, that that is what the jury should do. The jury has been deliberating for a long time. I see no reason to suppose that the jury has not fully complied with your Honor's instructions.

The Court: I have examined the rules. They make no such provision for such interrogation.

Mr. Gladstein: Nevertheless, may the record show that I make that request?

The Court: Yes.

Now, I have already thanked you ladies and gentlemen of the jury in my charge and I wish to repeat that now. You have performed a service here (Tr. 16,120) that is exceptional. You deserve the thanks of the entire community for the patience and careful attention with which you have performed your duties.

Now before I discharge you I have some comments to make that I consider of extreme importance. I need not tell you of the importance of the case. It has been stressed by counsel for both sides here. Perhaps its importance transcends anything that has been said by counsel. And I tell you now, when you leave here do not discuss with anyone anything about the case, anything about your deliberations, anything about any of the votes that were taken—anything whatsoever that has to do with this case from the beginning to the end. You must not do that, either to relatives or friends, or members of the press or magazine writers, or any of the host of curious persons who may seek to elicit from you some information about it. Whatever you might say would be subject to misinterpretation, subject to repetition and change and do irreparable harm to the administration of justice.

And so I tell you, in the most earnest manner of which I am capable, keep to yourselves everything that has occurred, everything that you have thought or have done or have not done. That is all a matter which rests and should remain solely with you. (Tr. 16,121)

And so I now tell you you may go with the thanks of the Court.

(Jury dismissed at 11:35 A. M.)

The Court: Now I turn to some unfinished business. The following will kindly rise:

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis.

(The above-mentioned rise.)

The Court: I will read a portion of the certificate which I have prepared pursuant to Rule 42(a) of the Federal Rules of Civil Procedure having to do with criminal contempts.

> "In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below were committed in the actual presence of the Court and were seen or heard by the Court during the trial of the case of United States of America v. Foster, et al., C 128-87, which commenced on January 17, 1949.
>
> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result (Tr. 16,122) of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants"——

meaning you, Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis——

> "deliberately entered in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking inci-

dents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

"I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial (Tr. 16,123) system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the Court and to preserve order in the courtroom, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

"Accordingly, I adjudge the following guilty of the several criminal contempts described below"

and they are enumerated against each of these defendants.

Thirty-nine of them I shall not read, as they are sufficiently stated in the certificate.

The first, however, I shall read as follows:

"During the entire trial, Messrs. Sacher, Gladstein, Crockett, McCabe and Isserman (Tr. 16,124), attorneys and counsellors-at-law, and after March 17, 1949, Mr. Dennis, attorney pro se, joined in a wilful, deliberate,

and concerted effort to delay and obstruct the trial of United States v. Foster, et al., C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities.

"To effect this plan, these defendants in this proceeding, contemptuously and without justification:

"a. Disregarded numerous warnings of the (Tr. 16,125) Court concerning their wilful delaying tactics, except for ironical references thereto;

"b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;

"c. Insinuated that there was connivance between the Court and the United States Attorney;

"d. Insisted on objecting one after another to rulings of the Court, despite a ruling on the first day of the trial, repeated several times thereafter, that all objections and exceptions would inure to the benefit of each of their clients unless disclaimed;

"e. Persisted in making long, repetitious, and unsubstantial arguments, objections, and protests, working in shifts, accompanied by shouting, sneering, and snickering;

"f. Urged one another on to badger the Court;

"g. Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality;

"h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;

(Tr. 16,126) "i. Disregarded repeatedly and flagrantly the orders of the Court not to argue without permission and to desist from further argument or comment;

"j. Disregarded rulings on the admissibility of evidence so as to endeavor to place before the jury by leading questions the subject matter excluded;

"k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

"l. Accused the Court of racial prejudice without any foundation; and

"m. Generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the Court which could then be relied upon as a demonstration of the Court's unfitness to preside over the trial."

I will now proceed to judgment.

Harry Sacher, you are adjudged guilty of the contempts of court as specified in the certificate to which I have just referred, to wit, specifications 1, 2, 5, 6, 7, 8, 12, 14, 15, 16, 17, 18, 19, 25, 27, 28, 29, 30, 31, 33, 36, 37 and 39.

(Tr. 16,127) It is adjudged that you are sentenced to imprisonment for a period of six months on each contempt and that the aforesaid sentences shall be served concurrently.

It is adjudged that on the 15th day of November, 1949, you shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of six months.

Richard Gladstein, it is adjudged that you are guilty of the contempts of court as specified in the accompanying certificate, to wit, specifications 1, 4, 6, 8, 10, 11, 12, 13, 18, 20, 23, 24, 26, 27, 31, 32, 34 and 35.

It is adjudged that you are sentenced to imprisonment for a period of six months on each contempt and that the aforesaid sentences shall be served concurrently.

It is adjudged that on the 15th day of November, 1949, you shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of six months.

George W. Crockett, it is adjudged that you are guilty of the contempts of court specified in the accompanying certificate, to wit, specifications 1, 3, 7, 21, 22, 27, 29, 37 and 38.

(Tr. 16,128) It is adjudged that you are sentenced to imprisonment for a period of four months on each contempt and that the aforesaid sentences shall be served concurrently.

It is adjudged that on the 15th day of November, 1949, you shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of four months.

Louis F. McCabe, it is adjudged that you are guilty of the contempts of court as specified in the accompanying certificate, to wit, specifications 1, 6, 7, 8, 9 and 27.

It is adjudged that you are sentenced to imprisonment for a period of thirty days on each contempt and that the aforesaid sentences shall be served concurrently.

It is adjudged that on the 15th day of November, 1949, you shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty days.

Abraham J. Isserman, it is adjudged that you are guilty of the contempts of court as specified in the accompanying certificate, to wit, specifications 1, 6, 7, 12, 27, 31 and 32.

(Tr. 16,129) It is adjudged that you are sentenced to imprisonment for a period of four months on each contempt and that the aforesaid sentences shall be served concurrently.

It is adjudged that on the 15th day of November, 1949, you shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four months.

Eugene Dennis, it is adjudged that you are guilty of the contempts of court as specified in the accompanying certificate, to wit, specifications 1, 19, 22, 31 and 50.

It is adjudged that you are sentenced to imprisonment for a period of six months on each contempt and that the aforesaid sentences shall be served concurrently.

It is adjudged that on the 15th day of November, 1949, you shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months.

Now are there any motions?

(Tr. 16,130) Mr. Isserman: May it please the Court, I desire to object to each and every finding in the certificate to which the Court has referred on the ground that the same are wholly unwarranted by anything which has occurred in the course of this trial.

Your Honor's action in respect to me is but a reflection of the atmosphere of bias and prejudice which this Court has shown and with which this entire trial was attended from the very first day. Your Honor's action is an effort to intimidate members of the bar in their bounden duty to represent their clients to the best of their ability, and is a reflection of the article by now Justice Clark of the Supreme Court in which he threatened to punish and go after lawyers who are defending clients charged with being Communists.

I also wish to say that your Honor's conduct in the sentence of me and in the punishment is but another aspect

of what your Honor has done in this case to make an easy road for conviction of the defendants. I am quoting Justice Jackson in the Krulewitch case in respect to conspiracy.

I charge further that your Honor's conduct is against every judicial canon of ethics and as such is but a sharp reflection of the very bias and prejudice (Tr. 16,131) with which we have charged your Honor from the beginning of this case.

I wish to state also that all I have done in this case has been in the pursuit of the defense of my clients under the most difficult circumstances and in a case which your Honor has finally said, in discharging the jury, has a greater importance than even counsel for the defendants have claimed. And I wish to remind your Honor that when we did claim it you held us in contempt because you said this was an ordinary criminal case. Your Honor's action in my case has proved conclusively that it is not an ordinary criminal case, that it was a trial in which there was no substance of due process, of any due process.

I therefore move for a vacating of your certificate.

The Court: The motion is denied.

When I said "any motions" I meant were there any motions relative to the case in which we have just received and recorded the verdict.

Mr. Isserman: If the Court please, in respect to the case, on behalf of my clients I wish to advise your Honor that we intend to file a motion in arrest of judgment and a motion for a new trial within the time (Tr. 16,132) allowed under the rules or such further time as your Honor may allow on application within the next five days, and that pending the filing of such application and the argument thereon that the bail for the defendants be continued, and that the defendants who have been remanded to jail for the period of the trial now be allowed on bail as undoubtedly the trial has ended with a verdict of the jury.

The Court: I shall not release those defendants who have been in custody. Indeed, I shall remand and now do remand all of the defendants pending sentence, and I shall impose sentence one week from today. That is to say, at 10.30 o'clock in the morning of October 21, 1949.

How much time do you desire within which to make the motions? The rule provides, and you yourself have just indicated, Mr. Isserman, that an application might be made for an enlargement of the five-day period provided the application was made within that period. I should prefer to entertain that application now. I do not insist upon it.

Mr. Isserman: In view of the length of the record and the issues involved and the time required to prepare such a motion and to argue it, I ask that (Tr. 16,133) the five-day period be extended not to exceed thirty days. The filing of the motion.

The Court: Well, I will hold that in abeyance until I have heard what the other counsel have to say.

Mr. Sacher: May it please the Court, I take it that you have disposed of the application for bail on behalf of these defendants.

The Court: Well, I have no open mind on it. It seems to me it is the only thing I can properly do, in view of the evidence here, which in my judgment, after the most careful study during the trial, amply supports the verdict. I feel I have no other alternative than to remand the defendants, and I have decided to do that.

I think if you wish to present any motions now you may do so. What I am particularly interested in at the moment is the time of enlargement of the making of motions under the rule. I am not disposed to grant thirty days, but I should like to hear from all counsel on that before I make any determination.

Mr. Sacher: I think that your Honor's concluding remarks to the jury have indicated an appreciation on your Honor's part of the profound questions that are neces-

sarily involved in this case. I think it must be (Tr. 16,134) appreciated that the last word has not been said, as indeed it could not be said, in this court. If what American lawyers have come to regard as constitutional liberties in our country still survive unimpaired, then I feel that the day is inevitable when this verdict and this judgment will be reversed.

I think, however, that the complexity of the questions, the volume of the questions, the hugeness of the record, require that, if we are to assist your Honor in arriving at a decision of the application for an arrest of judgment and for a new trial, that we should have an opportunity to lay it before you.

The Court: Well, now, before you go on there, Mr. Sacher, it must be apparent to you and to the other counsel for the defendants that I have done everything that a human being could do to be careful in this case. On the law, I have studied it until my eyes nearly stopped functioning; I have worked on it, I have theorized on it. I have been over every one of these applications that have been made here so repetitiously; I am familiar with these arguments that have been made and the points that have been made. And having decided them so often, after the most mature consideration, it seems to me highly improbable that on the making of motions, which (Tr. 16,135) will inevitably be another repetition of the same points, that I shall have a different view on it. This is not the only important criminal case there was before. I have participated as a lawyer in many of them myself, and I have never known one where more than a few days' of reconsideration of the same questions pressed upon the Court at the trial was allowed afterwards. Indeed, I can recall many where the motions were made promptly at the conclusion of the trial and denied from the bench, not because the Judge had not or did not desire to consider the point, but because he had considered them and studied them and gone over them.

Now, with that in mind it seems to me that thirty days is not a period that is appropriate under these circumstances.

Mr. Sacher: You see, your Honor, we assume that every time we present something to your Honor that you will consider it, and you have more than hinted that your mind is pretty much made up on the motion that we are talking about in advance of hearing anything. You assume repetition, you assume many other things.

The Court: All I say is, when a Judge has (Tr. 16,136) decided the same point once, twice, three, four, five times, that it seems highly improbable that the sixth time that point is presented to that same Judge that he will come to a different conclusion. That is all I say.

Mr. Sacher: But something new has been added to the situation and that is your Honor's charge to the jury. And certainly that will involve a number of questions or arguments which we need time to argue. And I think I do not overstate the case when I say that your Honor has given us one or two little things to think about, in addition to this motion, in the time that we are talking about. I should like briefly, with the Court's permission, to address myself to that for a moment as a consideration for time.

The Court: You may do so.

Mr. Sacher: I should like to say to your Honor that I should have thought that a due regard, for what at the moment I have at my command no other words, for the decencies, that we lawyers should have had an opportunity to be heard before we were adjudged guilty and sentenced. I recognize——

(Tr. 16,137) The Court: This is not a proceeding under Rule 42(b).

Mr. Sacher: I recognize, your Honor, that the power rests in the Court to act summarily. I am not concerning myself at the moment with power. I am concerning myself rather with the question of discretion and judgment. And

I should have imagined that at a time like this when the Court has imposed sentences of such great consequences, it would have seen fit to have acted in accordance with what we regard as American tradition, one that would give us a running chance; we should have had that.

I wish to say to the Court that I have an abiding faith that the time will come when it will be appreciated that counsel in this case served not only their clients, not only the due administration of justice, but served all the people of our country, in the great traditions of Andrew Hamilton, Charles Evans Hughes, Clarence Darrow and Wendel Willkie. True, we are much humbler laborers in the vineyard, but humble or not, the fact is that we six counsel yield to no one in love of country and in love of the constitutional liberties which we have learned to love and to seek to preserve.

And I therefore should move the Court at (Tr. 16,138) this time to take those facts into consideration in connection with, one, the enlargement of time as requested by Mr. Isserman so as to give us an adequate opportunity to prepare, and secondly, I would respectfully appeal to the Court to reconsider what it has done to the lawyers and to give them an opportunity to be heard before they are found guilty and sentenced.

I say to your Honor that the bar of New York and the bar of America will not agree that in a matter of such consequence lawyers should have been summarily disposed of, as your Honor has done.

The Court: Let me say this to you, Mr. Sacher: as to these contempt adjudications, let them be notice to you and to all who may be tempted to follow your example that there is power in the judicial system of the United States under the Constitution and the laws of the United States to protect and maintain the dignity of the court and the orderly administrative of justice therein.

It is contemplated in the rules that the punishment should be summary. I have waited until today because it was the first time that I could act, as I have indicated in what I read to you from the certificate.

Mr. Sacher: I wish to say to your Honor that (Tr. 16,139) I have a grave fear that, far from accomplishing the objectives which your Honor has just referred to, that your Honor's summary punishment can only have an effect of intimidating the bar of America.

In that connection let me point out to your Honor that there are States in the South where the Negro people are still excluded from service on juries systematically, and I say to your Honor that if any part of the punishment meted out to us arises from the fact that we challenged the method of selection, then I say to your Honor that what you have done is to give encouragement to judges in the South to intimidate lawyers of every race and color in the South against seeking to democratize the jury system there.

And I respectfully submit, your Honor, that a country with an intimidated bar is a country whose liberties are in danger. Here in America we know that the American bar occupies a place of honor in the achievement and preservation of the liberties of our people, and I say, your Honor, with all due respect to your decision and judgment here that any threat to the integrity, independence and courage of the bar can only constitute a threat to the integrity and wholesomeness and preservation of our (Tr. 16,140) civil liberties.

For myself let me say, your Honor, that I speak of intimidation not in personal terms. If it be necessary that in the cause of American liberty I shall have to serve six months, then I say to your Honor the price will have been very, very small. I hope that it will not be necessary in our country for an advocate to have to do that, but if it be necessary——

The Court: It isn't the price of liberty; it is the price of misbehavior and disorder as stated in the certificate.

Mr. Sacher: I say to your Honor——

The Court: You continue in the same brazen manner that you used throughout the whole trial. You try to make it appear as though it were non-existent and you had never done any of these things. From the beginning you have never shown the slightest trace of consciousness of what you have done or any desire to amend your ways; despite all kinds of warnings throughout the case, you continue with the same old mealy-mouth way of putting it which I have been listening to throughout the case. It would have been much better if you had paid attention to what I told you not to do. That would have been an effective (Tr. 16,141) way.

Mr. Sacher: Well, your Honor, I don't think it would moot anything to continue the discussion. I made this argument in support of what is really an application for an opportunity to be heard before we were found guilty.

The Court: Very well; I will hear the others.

Mr. Gladstein: Your Honor, may I say a few words?

The Court: Yes.

Mr. Gladstein: Your Honor has adjudged me guilty of contempt, and a judgment, I may say, which is unique in my experience, not only that such a judgment should be rendered but indeed that anyone should accuse or think of accusing me of contempt of court, for never in two decades of practice at the bar has anyone suggested or intimated that my conduct has been for the purpose of bringing the administration of justice into disrepute. To the contrary, I pride myself upon the fast friendships and the strong bonds which I have formed with many judges in the Federal Judiciary throughout the United States in many jurisdictions. Your Honor, I wish I could say that I felt some consciousness of guilt of the things that your Honor read from that document, because if I did it would be (Tr.

16,142) much easier to reconcile myself to the idea of accepting punishment, but it is not easy to accept the notion of being punished without having committed a crime.

As I read your Honor's description, which, by the way, constitutes a characterization rather than an enumeration from the record of the things that were actually said or done, it seemed to me very difficult to put myself or my colleagues in this case in the places which your Honor has assigned. It seems to me that your Honor was describing something like a moving picture which was flashing in front of me and in which the characters were other people.

I must say that in this case my sole effort has been, as it has always been, to take seriously and to put life into those high canons of ethics which are ingrained in us at the outset of our professional careers, and the most important of those canons to me that it is the solemn duty of an American lawyer never to turn away the cause of the oppressed or the unjustly accused.

This case to me represents one in which men have been accused, and the effort has been made to imprison them because they spoke their minds freely and honestly. It is the duty of a lawyer in any case to defend his clients with zeal, with earnestness (Tr. 16,143) and with fervor. That duty becomes even more solemn and important in a case where the rights and the precious liberties of all the American people are really deeply involved.

I must say for myself that I do not accept the characterizations of my conduct which the Court has seen fit to set forth, but however that may be, the passage of time and the judgment of history will determine whether your Honor's accusation against me is the true one, or whether it be that I and those who have been associated with me in defense of this case have sought always and exclusively to defend our clients in accordance with the highest traditions of the American bar.

Mr. Crockett: May I be heard, with the Court's permission?

The Court: Yes.

Mr. Crockett: Long prior to today your Honor saw fit to adjudge me in contempt, which I believe was the first adjudication of contempt that had been made in the course of the trial. Today additional adjudications have been made. As a lawyer, I shall of course take whatever course of action is open to me to remove from my record that any Court has found my conduct inconsistent with the (Tr. 16,144) best conduct to be expected from a member of the American bar. Nevertheless, in this particular instance, I regard it as a badge of honor to be adjudicated in contempt for vigorously prosecuting what I believe to be the proper conception of the American Constitution, and I say again that if I were offered the opportunity to participate in another trial like this I would fight it just as vigorously as I have tried to fight at this time.

It so happens that because of conditions in America, I of course look upon many problems different from the way my associates, perhaps the Court, would look upon them. I have to look upon them not only as a lawyer but also as a member of a minority group. For the first time in the fifteen years that I have been practicing law I have had an opportunity to practice law as an American lawyer and not as a Negro lawyer. I have enjoyed that brief trip into the realm of freedom, as far as the practice of law in America is concerned. I have enjoyed it so much that I intend to continue that way. I am aware, of course, that this is an important case.

I am also aware that this is not the end of this case. There have been similar instances in history, especially in connection with trials under the Alien and Sedition Laws, and judges (Tr. 16,145) have seen fit to imprison attorneys because the attorneys had disagreed with the judge's conception of the law, but history revealed that the attorneys in those cases were correct.

I have faith in history, I have faith in the American people, I have faith in the American bar.

Mr. McCabe: If your Honor please, I have had occasion before, during this trial, to state to your Honor that I did not accept the strictures which from time to time your Honor addressed to me.

I now wish to put upon the record a categorical denial of the charges and the findings which you have made with respect to my conduct. I have said that I yield to no one in appreciation of the oath which I took, in which I pledged full fidelity as well to the Court as to my client. I have tried to live up to that oath.

I should like to read into the record paragraph 15 of the Canons of Professional Ethics which I read before I entered on the trial of this case, and indeed before I accepted a retainer.

Paragraph 15 of the Canons of Professional Ethics laid down for the guidance of lawyers reads as follows:

> "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance (Tr. 16,146) and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

If I have been guilty of some neglect or failure to carry out paragraph 15, to carry out my duty to my client, I regret it. If I have been guilty of any failure to observe the obligation which I took to observe, full fidelity to the Court, I regret that also.

Extract From Stenographer's Minutes.

In going over the various sections of the record in which discussions were had between the Court and myself, I may say that I have been unable to find any aggressions or failures to observe that oath which warrants the findings which your Honor has made without a hearing here today.

(Defendant Dennis rises.)

The Court: Yes, Mr. Dennis.

(Tr. 16,147) Defendant Dennis: This trial and the verdict, is an evil and an illegitimate product of a bi-partisan conspiracy, of a conspiracy of men who want to destroy the Bill of Rights and peace, and I think that the adjudgment of counsel and the accompanying decision to remand the defendants without bail is in keeping with the sinister and police state character of this trial. I don't think any democratic-minded American, and people in other lands, will pass off lightly even the sentencing of the lawyers which took place today because this is just the first teeny fruits of the infamous verdict in this trial, but it will serve to alert and to arouse our people as to their stake in what has happened here. And I would say to your Honor, as in Nazi Germany, in Mussolini Italy, men also sat in high tribunals, also wore black robes and also handed down pro-fascist decisions; but I would remind the Court that the people reversed those verdicts and decisions just as our people will reverse the decisions and the verdict in this case, and the people's verdict will be for peace, for democracy and for social progress.

Mr. Isserman: If the Court please, it is quite obvious that November 15th will be a date at which our services to our clients in connection with (Tr. 16,148) the various matters of this case will not—at which those services will not be terminated. It is also quite obvious from what counsel have said that we will not let the matter of your Honor's sentence rest where it is, and certainly we will consult with each other and with counsel and take such steps as we can

to erase this blot which is more a blot upon the American judiciary than it is upon us.

The Court: That won't help it——

Mr. Isserman: May I continue?

The Court: Yes.

Mr. Isserman: I ask, therefore, in view of the fact that the Court has made the entire record of this case a part of the record on which you sentenced us, that you defer the execution of sentence, or stay the execution of sentence on counsel until such time as the appeal they will take, if an appeal be necessary, be disposed of, so that, 1, we can continue in our own defense during such an appeal, and, secondly, which is even more important, that we be unhampered in continuing our duties to our clients which at this stage of the proceedings cannot lightly be turned over to other counsel. And I ask your Honor——

The Court: That request is denied.

Mr. Isserman: I ask your Honor further to (Tr. 16,149) consider the question of bail pending the sentence of the defendants; the one single fact that your Honor's charge, as made yesterday, contains interpretations of the United States Constitution and the First Amendment which cannot be the last word on that interpretation, and which is not in accord with any prior decision of the United States Supreme Court—in fact, I regard it as verbal semantics to undermine the First Amendment and nothing more.

Be that as it may, that one question alone indicates that there is a substantial question on appeal, and under the Federal statutes and cases where there is such a substantial question to be decided on appeal, the defendants are entitled to bail, and I therefore ask your Honor to reconsider your Honor's ruling on the remand of the defendants to jail at this time, and to allow them on bail so that they may assist in the preparation of whatever next steps are necessary, and so that the principles of law which govern bail be lived up to.

The Court: Well, I will hold the matter in abeyance until I hear from Mr. McGohey.

Mr. Gladstein: May I make one further request, your Honor?

The Court: Yes.

(Tr. 16,150) Mr. Gladstein: Since your Honor has read only a portion of the certificate of adjudication with respect to each of the defense attorneys, and your Honor has indicated that each certificate incorporates by reference the transcript of the entire proceedings in this case, including the proceedings involved in the jury challenge, I take it that I am correct in saying that each lawyer has a right to expect to receive a full copy of the Court's adjudication in his case so that he may proceed with such legal steps as he deems advisable.

The Court: Well, that is all out of my hands now. Whatever is necessary to be done the United States Attorney doubtless will do it. I have only prepared in my chambers the copies of those that could be readily typewritten off by my personal secretary, and I suppose the number of copies altogether are only four or five.

Mr. Gladstein: That's isn't the point of my (Tr. 16,151) inquiry. Since your Honor incorporates by reference in the document, and therefore there is deemed attached to your Honor's certificate the transcript of proceedings, I now ask that the Court direct that if, as and when such certificate is served upon me—and I take it each of the other defense attorneys makes the same request with respect to himself—there be delivered as a part of such certificate of adjudication the complete document that your Honor has now read, including the portion deemed read by virtue of your Honor's incorporation by reference.

The Court: You don't mean a whole copy of the record?

Mr. Gladstein: I do, indeed.

The Court: If you do, the motion is denied.

Whatever the law requires to be done I have no doubt Mr. McGohey will do, and if there is later presented to me some questions that are within my competence to decide on that, why, I will entertain them as they come along.

Now, Mr. McGohey, what do you say on this matter, this twofold matter, first, of remand, and, secondly, of the time within which to make motions? (Tr. 16,152)

Mr. McGohey: Well, answering them in that order, your Honor, there is certainly no doubt about the provisions of the rule that authorize the remand of the defendants at this time pending sentence.

The Court: There is no doubt whatever of that.

Mr. McGohey: Nor is there any doubt that your Honor's announced decision as to how you intend to exercise the power and the discretion which the rule gives you is, in my opinion, perfectly sound. There can be no reason, there has been no reason urged upon your Honor why in a case of this kind any more than in a case of other important matters in this court, the defendants, with a verdict of guilty, are normally remanded until the time of sentence. Your Honor is doing nothing here that wouldn't have been done and hasn't been done many times in this district and in other districts in similar cases; and I say that your Honor, I hope, will not change what you announced was your attention to do with respect to that. I think the remand should stand.

Now with respect to the question of time, let me recall to your Honor that back a year ago all of the constitutional aspects which the defense counsel believed inherent in this case were raised. (Tr. 16,153)

They were argued at great length for three full days before Judge Hulbert.

Motions of the same kind were renewed before your Honor in December, I think; then again in January, back in January when we began the trial. They were urged upon your Honor at various times throughout the Govern-

ment's case. They were urged and argued and briefed at the end of the Government's case, and in each one of those instances there was a repetition of the same arguments, the same citation of cases and the same thoughts which it was hoped would change your Honor's view from what you had first expressed and from what Judge Hulbert had expressed in October of 1948.

And then when at long last we came to the end of the whole case and both sides had rested, for two weeks we heard again the same arguments on the same propositions of law. We went over the same thing again. We had all the motions to strike.

Now it is true, as counsel says, that at this stage there is something in the case which wasn't there before, the Court's charge. But if there ever has been a clearer document I haven't come across it in the books, and it is in the record, and it seems to me that if your Honor were to allow an additional (Tr. 16,154) five days beyond that prescribed in the rules, that counsel would certainly have ample time to prepare and brief any argument that could be made.

Bear in mind, as Mr. Isserman indicates, the chief point of attack upon the charge is your Honor's view of the constitutional question. Now that is the thing that we have been arguing for over a year.

Now if the Court were to grant an additional five days, within which the motions could be made I mean, your Honor, that would give counsel a full ten days to get these motions prepared, and if the Court were to require that the motion papers be served on October 24th at 10 A. M. and that the argument be set down for October 28th at 10 A. M., counsel would certainly have ample time.

The Court: All right. That is just what I will do. I will——

Mr. Gladstein: Your Honor, may I reply?

The Court: What is that?

Mr. Gladstein (continuing): To Mr. McGohey with regard to the question of argument.

The Court: Yes.

Mr. Gladstein: I will be very brief about it. (Tr. 16,155) Mr. McGohey's main burden is that he anticipates that the same appeal on the constitutional question will be made which has been made before and which has been ruled upon by your Honor, but I think he is mistaken in two directions: First, I think that we have now reached the point where perhaps these same arguments may have new meaning. Old arguments in a new context can well have new meaning, and I think that it should not escape our notice that this case, this ordinary little criminal case that we have been trying here for so long is not escaping the attention of the Committee on Human Rights of the United Nations, and that attention by that committee and by that international organization has been focused upon the proceedings that have been taking place here, and I believe——

The Court: If that is what it is I will decide right now that the time——

(Mr. Gladstein attempted to speak.)

The Court: I don't want to hear any further argument on it. I will extend the time so that the argument on such motions as may be made will come before me on the 28th of October and that the (Tr. 16,156) motion papers be served on or before Monday, October 24th.

Mr. McGohey: Pardon me, your Honor.

The Court: Yes.

Mr. McGohey: Would your Honor add to that, that these motion papers should be served not later than 10.30 on October 24th, so that I can have that time? If I get them at 5 o'clock or 6 o'clock on the 24th I have only four days and not the five days' notice which I ought to have.

The Court: Well, I am not disposed to make it 10.30 in the morning, Monday. I will make it 3 o'clock in the afternoon of that day.

Mr. McGohey: Well, if your Honor please, would you require that they be served on Saturday? If I get them at 3 o'clock——

The Court: No, I don't think I want to cut their time down on that. This weekend business is always a difficult one with counsel. But it seems to me if you get them—what did I say, 3 o'clock on the 24th?

Mr. McGohey: You said 3 o'clock on the 24th. And then I have the 25th, 26th, 27th, I have three days then, your Honor. (Tr. 16,157)

The Court: Well, then, if you have to ask to have it put over a little bit they will all be glad.

Mr. McGohey: Well, I had hoped that maybe we would not have to put it over, your Honor. And three days is pretty short. We usually get voluminous papers, you know, on motions.

The Court: Yes, but if your arguments that you have just been making to me now hold and they just thresh over the same old straw, you won't need so much time. I think I am going to stick to that.

Mr. McGohey: 3 o'clock, Judge?

The Court: 3 o'clock on Monday, the 24th, for the service of the papers, and the argument at 10.30 o'clock in the morning of Friday, October 28th.

Now, I have given reconsideration to that matter of remanding and I am going to adhere to my ruling, that the defendants are hereby remanded and the date of sentence is fixed at 10.30 in the morning, one week from today, that is to say, October 21, 1949.

I will now adjourn court.

(Adjourned to October 21, 1949, at 10.30 o'clock A. M.)

The entire record in *United States of America* v. *Foster, et al.* C 128-87, is incorporated herein by reference as set forth in Point IV of Designation of Record on Appeal, infra, page 104.

Designation of Record on Appeal.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA vs. HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS, Defendants.	C131-36

For the purpose of enabling the Clerk to transmit to the Court of Appeals the record on appeal, the defendants designate as the record in the above-entitled case the entire proceedings in the District Court including the following:

I. Contempt Certificate pursuant to Rule 42 (a) Federal Rules of Criminal Procedure;

II. Orders dated October 14, 1949 adjudging all defendants herein in contempt, notice of entry therein and all other documents filed with the Clerk of the United States District Court in said case;

III. Pages 16,121 to 16,157 inclusive of the typewritten transcript of the court session of October 14, 1949 at which the above defendants were adjudged guilty of contempt and sentenced, as the same offense in the transcript of the case of *United States of America* v. *Foster, et al.*, C128-87;

IV. The entire record in the above-mentioned case of *United States of America* v. *Foster, et al.*, C128-87, which was incorporated by reference in the contempt certificate aforementioned including the following:

(a) The entire typewritten transcript numbered pages 1 through 4,825 of the pre-trial proceedings;

(b) Pre-trial Exhibits 1 and 2 and A (id.) and B (id.);

(c) Defendants' challenge Exhibits 1 through 400 (id.), including those exhibits marked for identification but not admitted in evidence;

(d) The Government's challenge Exhibits A through EE, including those exhibits marked for identification but not admitted in evidence;

(e) The Court's challenge Exhibits 1 (id.) and 2;

(f) The entire typewritten transcript numbered pages 1 through 16,501 of the trial proceedings;

(g) The Government's trial Exhibits 1 through 234A, including those exhibits marked for identification but not admitted in evidence;

(h) The defendants' trial Exhibits A (id.) through 14 x D (id.), including those exhibits marked for identification but not admitted in evidence;

(i) All documents filed in the District Court, including pleadings, motions, opinions, findings, objections, orders, affidavits and all exhibits annexed hereto and filed in connection therewith;

(j) All other papers and documents placed in the custody of the Clerk of the Court, including voir dire questions and offers of proof.

(k) All docket entries in the Clerk's office.

V. All docket entries in the Clerk's office in this cause.

Dated, New York, N. Y., November 17, 1949.

Respectfully submitted,

WOLF, POPPER, ROSS & WOLF,
Attorneys for Appellants,
By s/ PAUL L. ROSS,
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Vol. II

TRANSCRIPT OF RECORD

(Pages 1 to 761)

Supreme Court of the United States

OCTOBER TERM, 1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 14, 1950.

CERTIORARI GRANTED OCTOBER 22, 1951.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

C. 128-87 *et al.*

UNITED STATES OF AMERICA

—vs.—

WILLIAM Z. FOSTER, EUGENE DENNIS, also known as Francis X. Waldron, Jr., JOHN B. WILLIAMSON, JACOB STACHEL, ROBERT G. THOMPSON, BENJAMIN J. DAVIS, JR., HENRY WINSTON, JOHN GATES, also known as Israel Regenstreif, IRVING POTASH, GILBERT GREEN, CARL WINTER, and GUS HALL, also known as Arno Gust Halberg.

CHALLENGE TRANSCRIPT

Before:

HON. SYLVESTER J. RYAN,

District Judge.

New York, January 3, 1949.

* * * * *

—Ch. Tr. 690—

* * * * *

The Court: An application to examine a defendant?

Mr. Sacher: But, your Honor, you see you come to the conclusion it is a routine motion on the basis of an unfamiliarity with the case, which you say you have. If it is routine it will entail no great burden on Judge Medina. The point we want to make here is this: We want to be in a position where we at all times are given the fullest constitu-

tional opportunity to defend the rights and interests of our clients.

The Court: You don't have to be put in that position. You are in that position.

Mr. Sacher: We are not. We are not to get the opportunity—

The Court: I don't want any more statements from you. I think your statement is contemptuous. The minute you enter this door you are given full

—Ch. Tr. 691—

opportunity to defend anybody you are here to defend.

Mr. Sacher: Yet when the District Attorney says what he said—

The Court: I don't want any more statements like that made in my presence.

* * * * *

—Ch. Tr. 706—

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Mr. Isserman: I have been in many cases in which the Court has been more than willing—

The Court: The remarks I made before concerning what I regarded to be a contemptuous statement I hope will not compel me to admonish you. Sit down. The motion is granted to the extent indicated and you may submit an order. If you can agree on the form of the order I will be glad to have you do so. If you cannot—

Mr. Isserman: May I—

The Court: Will you sit down, counsel.

Mr. Isserman: I will do it, but I object to your Honor—

The Court: Will you sit down and keep quiet while I am talking.

* * * * *

Colloquy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 128-87 etc.

UNITED STATES OF AMERICA

—vs.—

WILLIAM Z. FOSTER, EUGENE DENNIS, also known as Francis X. Waldron, Jr., JOHN B. WILLIAMSON, JACOB STACHEL, ROBERT G. THOMPSON, BENJAMIN J. DAVIS, JR., HENRY WINSTON, JOHN GATES, also known as Israel Regenstreif, IRVING POTASH, GILBERT GREEN, CARL WINTER, and GUS HALL, also known as Arno Gust Halberg.

Before:

HON. HAROLD R. MEDINA, *D. J.*,

(and a jury).

New York, January 17, 1949

10:30 a. m.

. . . . .

—Ch. Tr. 847—

. . . . . .

The Court:

I may say now—and this will go for the entire trial—that where one counsel objects and an unfavorable ruling is made, an exception may be

deemed to be noted not only in favor of and for the benefit of the client of the man objecting, but for each and every one of the other defendants, except in such case as someone representing one or more of the others may state in the record that

—Ch. Tr. 848—

he does not desire to join in the objection. I think we may have that stipulated for the entire trial, and it will save quite a little trouble, and certainly make sure that no one will be prejudiced by not having the benefit of an exception to an adverse ruling.

* * * * *

New York, January 20, 1949

* * * * *

—Ch. Tr. 1289—

* * * * *

Mr. McGohey: If your Honor please, in view of the suggestion which has been made in argument that your Honor as well as other judges of the court might be called as witnesses here, it seems to me, while I don't want to commit myself now as to what the law is on that question of calling the judge who is presiding at the hearing, it may be that the law is that the judge presiding if called as a witness

—Ch. Tr. 1290—

would thereafter be disqualified at least in that proceeding, which would mean that if that be the law and your Honor were called here, that then your Honor would be disqualified from continuing this inquiry into the constitution of the jury.

Colloquy

In order that time be not wasted I suggest that we ought to be informed now as to whether or not your Honor is going to be called. And if that be so I think we ought to as speedily as possible determine whether or not that would disqualify you from continuing with it so that then your Honor might stop at this point. Otherwise, what may happen is that if your Honor continues in the proceeding up to the point where you would be called maybe as the last witness and would thereafter be disqualified, it would mean that a new judge would have to come in and we would have to go over the whole proceeding all over again.

The Court: Well, it would be an extraordinary thing if a maneuver of that kind would automatically procure a delay and disqualify the judge. I can't persuade myself that that is going to be the law. At the moment I can't conceive of anything in reference to this matter concerning which I could give competent and relevant testimony, and I am inclined to think you will find the cases hold that where such is the case, and it is for the judge to

—Ch. Tr. 1291—

say that, not for counsel, that despite the desire to call the judge and have him testify, it will not be done. But I would rather refresh my recollection as to what the authorities hold, and I shall try to do that promptly and take appropriate action. If it should be the law, as I don't think it is, counsel who have repeatedly desired delay for various stated reasons, could procure that delay by merely asking the judge to be sworn. But we will see about that,

and I will bear in mind what you have said and attempt to give that prompt consideration.

Now I think it is appropriate for the defense counsel to indicate what it is that they consider I can competently testify to in this matter.

Mr. Isserman: May I be heard for a moment or two, your Honor, on that point?

The Court: Yes, you may.

Mr. McCabe: Before conferring I would like—

The Court: Whichever one of you desires to address me first may do so.

Mr. McCabe: I should like to go on record, your Honor, as taking exception to your Honor's implied reference to the consideration of calling your Honor as a witness as a maneuver used in connection with the delay.

The Court: I say it could be. I did not say

—Ch. Tr. 1292—

that it was being used here for that purpose. One of the things that seems so difficult for counsel to understand is that whenever you are discussing a proposition of law it is immediately inferred that you are charging somebody in the particular case. I say, if that were the law; as I indicated, I didn't think it was the law and one of the reasons I didn't think it was the law was that it would be a very readily available maneuver to automatically procure delay any time anybody wanted delay. Now, if you think that I have been referring to you or your colleagues, I say I am not. But I do also say that it seems a curious thing to me that such could be the law. But I do not pretend to know all the law. I like to look things up before I rule and find

out what the law is, which I think it is my duty to do, and that is precisely what I am going to do, and you may recall it is what I indicated earlier this morning that I wanted to do—by asking counsel to submit memoranda of law to me.

Now what is it that you propose to prove by me?

Mr. McCabe: I think that is a matter which is inappropriate to discuss at this time, your Honor.

The Court: You would all rather tell me later?

Mr. Gladstein: On the witness stand, your Honor.

Mr. Crockett: Your Honor will recall that in my statement I suggested that it might be necessary

—Ch. Tr. 1293—

before I establish the question of racial discrimination to call your Honor as a witness. I am not prepared at this time to state first whether or not it will be necessary to call your Honor, or secondly, for what purpose I will be calling your Honor; that is, what particular bit of evidence I shall endeavor to get from your Honor in the event it is necessary to call you.

Now I think under those circumstances my clients certainly cannot be compelled to commit themselves on the record at this time that they will call your Honor.

The Court: I now address myself to Mr. McCabe. What is it that you desire to establish through my testimony?

Mr. McCabe: That is a matter which I must respectfully decline to answer at this time, your Honor. I haven't even decided—

The Court: That is right.

Colloquy

Mr. McCabe: I haven't even decided that I should attempt to establish anything. I rose to make certain that no one would gather from your Honor's remarks that our declared intention of considering calling your Honor was at all in the nature of a maneuver or for any other purpose than to add light to the situation as we felt. I didn't like it, the remark, in conjunction with the word "delay."

I want to say that we have never sought delay in this case as delay. We sought a postponement

—Ch. Tr. 1294—

of the case for considerations which seem very persuasive and legitimate to us. And that is a very different thing in my mind from seeking to delay a case.

The Court: Mr. Sacher, what is it that you will desire to establish by my testimony?

Mr. Sacher: I too, your Honor, must respectfully decline to have your Honor ask that question, any more than any other witness might appropriately ask what I am going to ask him and whether I will call him. I might, though, point out that the dilemma in which the Court and the prosecution now finds itself might completely have been avoided had the motions which we made for the invitation of another judge from outside to come in been granted.

The Court: Mr. Gladstein, what is it that you desire to establish by my testimony?

Mr. Gladstein: Your Honor, I think I have made it clear what my position is on that question. I adopt the same answer that has been given, and I remind your Honor in connection with your statement about the maneuver, which you have now ex-

plained did not intend to apply to us, that it was asserted at the outset in connection with our motion here for an outside judge to hear this matter of the challenge, it was asserted by us that it was inappropriate, improper for anybody who sits as a judge in this court to pass on this challenge.

—Ch. Tr. 1295—

The Court: Mr. Isserman, what is it that you desire to establish by my testimony?

Mr. Isserman: Well, if the Court please, the Court is going on an assumption which is not borne out by the present state of the record. I have not said that I desire to call your Honor as a witness. However, in all frankness, I should say that in my consideration of the evidence which must be adduced on this issue that the possibility of calling your Honor has come up. Whether that possibility will ripen into actuality will depend upon the proof and the admissions and the evidence which we will get from other witnesses including officials connected with this court.

And at this point it is not possible for me to state (a) that I will call your Honor, and (b) on what specific issue will your Honor's testimony be necessary in connection with the development of a positive point or the refutation of the statement of some official.

The Court: Are there any other counsel representing the defendants other than the five lawyers that I have just addressed myself to?

Mr. Gladstein: The five represent among them all of the eleven defendants.

Colloquy

The Court: I intend to make my inquiry comprehensive so that if there be other counsel here rep-

—Ch. Tr. 1296—

resenting any of the defendants, I address myself to them and ask them to arise and indicate to me the subject on which they would seek to interrogate me, if there be any such subjects.

(No response.)

The Court: And I gather by not hearing any response to that, that there are no other lawyers here who can shed any light on the subject.

Now we will go ahead from there.

* * * * *

New York, January 21, 1949

—Ch. Tr. 1354—

* * * * *

The Court: It is sufficiently plain to me that I may not testify as a witness in a case over which I preside as judge, and I shall not do that.

Now, the question is whether or not the defendants intend to attempt to call me as a witness. On that subject I interrogated each counsel yesterday and received answers that I consider quite unsatisfactory. My disposition is to rule now that I know nothing about the matter, had no contact with the selection of juries or the jury system in any manner, shape or form, and that I simply will not testify. But I shall listen to anything the defense has to suggest on that subject.

Colloquy

Mr. Sacher: Speaking for my clients, your Honor, I should like to make this observation, that pursuant to your Honor's request all counsel, of course, gave the matter grave and serious consideration. I think it is fair to say that the feeling is that it would be a matter of—it would be with great reluctance that we would contemplate the calling of your Honor to the stand. We are, however, confronted with unknowables at the present time—

The Court: Well, you would have to make up your mind now whether you want to take the position that you desire to call me or whether you do not,

—Ch. Tr. 1355—

because I will entertain no such application after the first witness is sworn.

Mr. Sacher: Well, your Honor, speaking for myself I can only say that inasmuch as such a choice as your Honor requires me to make is one that I can only make knowingly, and since I do not at the present time have within my command the facts on which such a choice would have to be made, I must respectfully decline to make that choice now; and that is said not with any view to maneuvering here. We are saying it because we genuinely, at least speaking for myself, do not know at this time what the record may reveal.

I think it is important to bear this in mind, that the theory on which the petition was filed with the Supreme Court seeking to invoke its supervisory power was predicated on the thesis that all the judges of the Southern District had in some manner or other participated in the administration of the method of selection of juries.

The Court: Now, you see that that is not the case. I have not participated.

Mr. Sacher: Well, may I say this, your Honor, that the question of what will constitute participation is something that we are not informed of right now. In other words, the point is that participation

—Ch. Tr. 1356—

may consist of a variety of facts and circumstances, and while it may be that your Honor played no part in the origination of the methods used in the past decade in the—

The Court: And I have had nothing to do with it since.

Mr. Sacher: You see, your Honor, I am not facetious about this, but even a so-called lack of participation might legally, despite its paradoxical aspect, be regarded as participation, you see.

The Court: Well, you have it on the record now that I have had nothing to do with it, have not participated in it at all.

What more do you want?

Mr. Sacher: Well, your Honor, as I say, fundamentally the question is one of what constitutes participation—

The Court: Well, let us not argue about it any more. Let me hear from each of the other defendants so that we will have the position of each made plain. I understand your position now.

Mr. Sacher: I would just like to add this, that our notion is not—I should like to make this clear—speaking, again, for myself; my colleagues will, of course, speak for themselves—I would not regard

Colloquy

—Ch. Tr. 1357—

your Honor's participation as a witness in this proceeding, qua witness, as a disqualifying factor.

The Court: I would.

Mr. Sacher: What is that, your Honor?

The Court: I would. I think if I am sworn as a witness I think I am automatically disqualified, and I have no intention of being sworn as a witness in a case about which I know nothing.

Mr. Sacher: All I want to make clear to your Honor is that so far as I am concerned, I am quite willing that swearing you in and having your testimony as a witness will not be regarded by me as a disqualifying factor except to the extent that the testimony might disclose—and when I say "testimony" I mean not only your Honor's testimony but the testimony and evidence produced in the proceeding—

The Court: I do not think that is a question in which any waiver by counsel is contained. If I take the witness stand, in my own view of the law, I become automatically disqualified. You might, and your colleagues might, for one reason or another, say that you are very glad to have me do it, but the effect will be the same, and I do not intend to do it.

—Ch. Tr. 1358—

Mr. Sacher: All I can say to your Honor is that to the extent of the power that the defendants and I as their counsel have to waive the disqualification of your Honor solely on the basis of testifying we are willing to do so, and if your Honor says it can't

be done then I most regretfully say that that is the extent to which I can go along.

The Court: Now let me hear from each of the others seriatim et singularum.

Mr. McCabe: On behalf of the defendants Dennis and Winston, your Honor, I say to your Honor that I simply cannot conscientiously foreclose myself by any action of mine from exercising what I might consider the duty and the right to call your Honor as a witness if facts are developed through previous inquiry or through the preliminary inquiry which would lead me to feel that your Honor should, despite your Honor's statement, which of course I accept as the fact, that your Honor never actively participated in the conduct of the selection of the panel which we are attacking. I say that very often acquiescence may be the most direct and most forceful sort of action. So for that reason I am not prepared now to say that I shall not call your Honor, I am not prepared to say that I shall find it necessary. I simply say that so far as is in my

—Ch. Tr. 1359—

power, your Honor has indicated that your Honor will exercise your own judgment and power to foreclose me if I didn't state now that—

The Court: I say now I will not be a witness.

Mr. McCabe: Then I have said all I can say, your Honor, and any action I may take in the future will have to be a matter of record to be passed on.

Mr. Crockett: If the Court please, I am unable to state at this time whether or not I shall have occasion to call your Honor as a witness. I am per-

suaded however that the mere fact that your Honor states that he will not be a witness, under my view of the law is not conclusive. I think the question will properly be presented to your Honor when and in the event I decide to call your Honor as a witness on behalf of my defendants.

Mr. Gladstein: Your Honor, I must say that inherent in the very nature of the moving papers that we filed is the distinct possibility that your Honor should be a witness in this case.

The Court: With respect to what?

Mr. Gladstein: With respect to the jury system or the administration of the system of justice in this court from the time it was developed by Judge Knox about ten years ago until the present date. And may I explain that, Judge?

—Ch. Tr. 1360—

The Court: Well, if you claim that there is some law that makes it essential that a judge immediately upon being sworn in must busy himself about this subject, then you have the fact to be that I did not busy myself about it. I had plenty else to do. Nobody suggested that I inquire into it, it never occurred to me to inquire into it; I had no reason to suppose there was anything the matter with the administration of the jury system, and I have had nothing to do with it.

Mr. Gladstein: Well now, your Honor will certainly recognize that we do have a right to establish by proof, by evidence, the assertions that are contained in our challenge. Those assertions embrace a period of approximately ten years, roughly 1938 or 1939 to the present date.

Colloquy

Now your Honor has been sitting on the bench here for a period of about a year and a half during the course of which, of necessity, your Honor has been an integral part of the functioning of the entire system including that which involves the selection of jurors. Your Honor of necessity in carrying out his official duties and functions has participated in conferences with other judges and has had some connections or relations with the operation of the jury system.

The Court: That I say has not happened. I have

—Ch. Tr. 1361—

had no conferences with any of the other judges or with any of the clerks or with anyone else on the subject. I have had absolutely nothing to do with it.

Mr. Gladstein: But your Honor raised this question, you asked whether it was the viewpoint of anyone that upon being sworn into office it becam your obligation to interest yourself in the manner in which the jury system—

The Court: That you don't need any testimony about. If that is so, it is so.

Mr. Gladstein: Well, on that my answer is distinctly yes, that I think it is the obligation not only of the judges of the United States courts to refrain from initiating procedures in connection with a jury system that are illegal, but likewise that it is an obligation upon the judges affirmatively to interest themselves in correcting any possible evidence or existence of impropriety, illegality or corruption in the administration of the jury system.

And your Honor himself raised the question a day or two ago—you remember this, Judge—as to

whether I felt that there was some obligation upon the judges, and I mentioned at that time that it seemed to me that, regardless of the state of the law, whether there was an obligation upon the

—Ch. Tr. 1362—

judge to involve himself in a supervision of the jury system or whether the obligation was to the contrary—that is to say, that he was to refrain from interfering in any manner whatever with the performance of the duties of the clerk or jury commissioner: in either event what has happened in this district is wrong and that the system in effect is impaled on the horns of a dilemma.

But my own view of it is that it is really the duty of a judge to inquire, to interest himself in the system of justice over which he presides or of which he is a part, and that the discharge of that duty requires him to take affirmative steps to correct what he finds to be wrong. And I say that while personally I would prefer—I would prefer—not to embarrass the judge who presides over a trial by calling him as a witness—

The Court: Well, it isn't easy to embarrass me. As I said a little while ago, I am not over-sensitive. It isn't a question of embarrassment. But get ahead now and tell me what your position is without too much circumlocution, and then we will hear from Mr. Isserman.

Mr. Gladstein: I desire the record to show that by reason of the inherent character of the challenge

—Ch. Tr. 1363—

filed here and by reason of the impossibility of knowing in advance—and your Honor must know

this as a practicing attorney of many years—of knowing in advance just what witnesses, potential witnesses on the fringes of his case may or may not have to be called, I wish the record to show that I reserve my right to ask your Honor to take the stand as a witness, and to advise your Honor that there is a possibility that I may wish your Honor to sit as a witness in this proceeding on this challenge. And therefore suggest to your Honor that in view of that distinct possibility, in view of the fact that your Honor has expressed himself very decisively against taking the witness stand in any proceeding in which your Honor presides over, I would suggest that—

The Court: You can double that.

Mr. Gladstein: I suggest that your Honor ask some other judge outside this district to preside over this portion, that is, this challenge.

The Court: Well you know, Mr. Gladstein, you have been trying, and your colleagues, to get me out of this case for a long time on various grounds. Now I have seen no merit in those grounds and I see no merit in this one. Now it may be that repeating it a little bit will serve to make the record clear, and I don't mind your doing it, but I do think

—Ch. Tr. 1364—

it is fairly clear that you would rather have me out of the case.

Mr. Gladstein: Well, your Honor, that is not the question we are discussing.

The Court: Well, all right.

Mr. Gladstein: We are discussing the propriety of your Honor's sitting—presiding over a matter in which counsel advise you that it is possible that they may desire to have your testimony, and that

that statement of counsel on its face is valid, sincere and has merit by reason of the fact that the moving papers which challenge the entire system of the administration of justice in this court distinctly raised the possibility of the necessity of calling all of the judges, including your Honor, who preside, who function in this court. And it is not a question of trying to get you out of the case. It is a question of whether it is appropriate for a judge to preside over a case in which he is advised that he may be called as a witness on a matter of such importance. This is not a question of whether you witnessed an accident on a street corner. This is a question that goes to the very heart of the whole system of justice in this court.

The Court: Now why don't you give Mr. Isserman a chance?

Mr. Isserman: If the Court please, I certainly

—Ch. Tr. 1365—

have no control over your Honor's statement of position which your Honor has elevated I believe to the strength and dignity of a ruling, but I do have a right to object to that ruling. And I object to that ruling because it is prematurely made and because it is clearly within the ambit of the issues before your Honor on this challenge, as indicated by the papers now before you, that the possibility at least, and I certainly would say it is clear indeed to me, that the possibility at least of your being a witness in this case is there.

The Court: That possibility is gone.

Mr. Isserman: Now your Honor's ruling apparently is the reason why your Honor states that pos-

sibility is gone. But the possibility is not gone, your Honor, that my client may require you as a witness. I desire the record to note that. And because I am obliged to represent my client I cannot now waive any right which he may have or any witness that he may need.

And therefore in objecting I wish to note the possibility of calling you as a witness and at the same time stating that if we arrive at that stage or that I do, it will only be after a very careful consideration of the evidence up to that point.

. . . . . .

—Cho Tr. 1378—

. . . . . .

By Mr. Gladstein:

Q. Mr. Allen, what is in round figures the assessed valuation of the home in which you live? A. Do I have to answer that, your Honor?

The Court: Will you read that, Mr. Reporter?

(Question read.)

The Court: I will sustain the objection.

Mr. Gladstein: May I be heard before your Honor sustains the objection?

The Court: Certainly you may be heard. I think it is entirely proper to ask him whether he owned property considerably in excess of the required amount. I would not permit inquiry of a person summoned as a juror or questioned to see whether he was qualified, as to what his property is; and

you start with his house, and then you would get into his safe deposit box and how much money he has got in his pocket, and so on and so forth, and I just won't permit that.

Mr. Gladstein: I think your Honor has perhaps forgotten—perhaps not—the charge contained and the allegations contained in our moving papers, and the assertions we make as to the nature of the

—Ch. Tr. 1379—

composition of juries obtained through the system of selection administered in this court; and one method of proof and a method of primary proof, the best possible evidence, is to obtain from the potential juror himself, the person on the list, that evidence to which Mr. Justice Jackson addressed himself when he was discussing the failures or the loopholes or omissions of proof in the Fay case, with which your Honor is familiar. I now submit, Judge—

The Court: Let me see the part of Mr. Justice Jackson's opinion that you are referring to. Have you got the volume here?

Mr. Gladstein: I have only the advance opinions.

Mr. McGohey: We have the volume.

The Court: The advance opinions have the same page numbers as the bound volumes. What page are you reading from?

Mr. Gladstein: I had not been, but I will read from page 1524.

The Court: I guess that is it. I guess that must be the Lawyers Edition, and I have the Official Edition here. You read and I will follow without tak-

ing the trouble to get the Lawyers Edition down. Read me the part.

Mr. Gladstein: Now, in that portion of the opinion Mr. Justice Jackson says this. He says:

—Ch. Tr. 1380—,

"The proof that laborers and such were excluded consists of a tabulation of occupations as listed in the questionnaires filed with the clerk. The table received in evidence is set out in the margin. It is said in criticism of this list that it shows the industry in which these persons work rather than whether they are laborers or craftsmen. That is, mechanics may be and probably are also laborers. Bankers may be clerks. Certainly the tabulation does not show the relation of these jurors to the industry in which they were classified, as, for example, whether they were owners or financially interested or merely employees."

Now, what Mr. Justice Jackson is saying there is this—

The Court: Well, I think I have followed it sufficiently to adhere to my ruling, and the objection is sustained.

Would you like to argue a little more?

Mr. Gladstein: I think so, and I think other counsel have a real interest in presenting argument to your Honor on this matter.

The Court: I will listen to them.

Mr. Sacher: If the Court please, I think one thing solely has to be borne in mind, and that is this,

—Ch. Tr. 1381—

that in all of our questioning we are going to address ourselves to proving the inclusions and exclusions enumerated in our papers. One of the basic charges made in our challenge is that systematically there have been chosen the rich, the propertied and the well to do, and that both the grand jury and the petit jurors have been made the organs of a specific class, namely, the rich, the propertied and the well to do; and the question that Mr. Gladstein has put is directed to the establishment of that proposition in regard to this gentleman on the stand. In other words, the purpose is to establish that he is among the rich, the propertied and the well to do.

The Court: Would your colleagues like to address me on the subject?

Mr. McCabe: I would like to call attention to one fact, your Honor: Your Honor seemed to fear that we were going into minute detail of the amount—

The Court: No. I say it is not relevant or competent to show exactly how much money the man has, what property he has. I think it is sufficiently disclosed for your purposes in the testimony already given.

Now, I am not going to keep explaining my rulings, and I am only listening to the argument that is made here in this preliminary stage, but as this question may be presented again and again, I hope

—Ch. Tr. 1382—

counsel will not assume that I am going to listen

to each lawyer on each objection, however repetitious, throughout the whole proceeding.

Mr. McCabe: You see, your Honor, you there again used the word "exact." We are not trying to ascertain the exact financial status. We are trying to fix upon the record the general classification. Now, the assessed valuation of a man's house I believe is in New York and other places a matter of public record. What we are interested in is knowing not whether he lives in a home assessed for $32,380, but whether it is in the class of a $10,000 home, a $60,000 home, or a $50,000 home.

The Court: He may be a mechanic, for all we know—

Mr. Sacher: He says he is a banker.

The Court: —but he does not look like one.

Mr. McCabe: But the record might show he did not look like a banker, your Honor, but I think he looks like a banker and talks like a banker.

The Court: Well, it is hard for me to distinguish the bankers in the subway, I will say that. But I have sustained the objection.

Now, if there is some legal argument that any of you want to present that is not just a repetition of what has already been said, I will listen to it,

—Ch. Tr. 1383—

but I honestly think that we have just about squeezed that question dry.

Mr. McCabe: Am I to assume from your Honor's indicating that you are going to cut off further questioning along these lines, that your Honor has concluded to his own satisfaction that Mr. Allen does fall within the class which we have described

as the rich, the propertied and the well to do?

The Court: I do not choose to answer that question, one of my reasons being that I think counsel has inadvertently dropped into the habit of catechizing the Court and asking questions of the Court which seem to me I don't want to over-encourage. I ruled on the objection, and I think what I have already said has been a sufficient indication of my disposition of the matter and my reasons.

Mr. McCabe: Now, your Honor, while I am on my feet, as they say over in Philadelphia, the records, our typewritten records will frequently show "Sit down, sit down, sit down" at regular intervals in the record where the Court is criticizing—

The Court: I have not told any of you lawyers to sit down.

Mr. McCabe: No. I say the records in Philadelphia will show that constantly; so if I inadvertently start to question a witness while I am on my feet,

—Ch. Tr. 1384—

I trust you will believe it is perhaps a nostalgic feeling that will make me feel so much at home, or that I am apt to fall into the bucolic ways of Philadelphia.

The Court: You have been doing pretty well. I particularly liked your quotation from Virgil the other day.

Mr. McCabe: Well, I did. I got the old books out again, but I won't burden the Court or the stenographer.

The Court: You were right about it. I was a little doubtful about the exact words. The metre did not quite seem to fit in. I thought maybe you had a word wrong. But, anyway, go ahead.

By Mr. McCabe:

Q. Mr. Allen, you stated you were a partner with Charles Allen, Jr.—

Mr. Gladstein: Your Honor, I had not finished my questioning.

Mr. McCabe: I will yield.

Mr. Isserman: If the Court please, I want to state an objection for the record, if I may.

I wish to object first to your Honor's ruling without hearing argument on the question of the objection which, in this case, was made by the witness.

The Court: I am hearing argument. What is this I have been listening to?

—Ch. Tr. 1385—

Mr. Isserman: If the Court please, I would like to state my position. I have not said a word to your Honor on this point.

The Court: All right.

Mr. Isserman: Secondly, I wish to call to your Honor's attention that if your Honor will rule on questions put by one counsel without giving other counsel a chance to state his position, then other counsel will ask the same question on behalf of his defendants and then argue his point.

Now, I object to your Honor ruling before defendants in this court are heard. And that is pre-

cisely what your Honor has done. And your Honor cannot take the position that an objection ruled upon by your Honor on a question put by one counsel is binding on other counsel unless other counsel are heard.

Now, I think your Honor's ruling was made hastily; I think there is important argument to be had on it, and if your Honor is willing to hear me now I will go into it, and, if not, I will do it when it comes my turn to question.

—Ch. Tr. 1386—

The Court: You may argue now in extenso.

Mr. Isserman: I ask first before I argue that your Honor withdraw your ruling.

The Court: The motion is denied.

Mr. Isserman: I take exception to that.

Now, if the Court please, this questioning and other questions like that are designed not merely to bring out the occupational status of the witness, which, from your Honor's remark, seems to be the basis of your Honor's ruling. The purpose of this and similar questions to be asked of this witness, and which I would put to this witness, or my colleagues would put and I would adopt, would be to establish the economic status of the witness to indicate that the inclusions improperly made in the selection and establishment of the jury list in the Southern District of New York are inclusions which are deliberately and systematically selected from those persons in a community of wealth and property, of extreme wealth and property, of an economic status which is different from the economic

status of manual workers and other residents of the community, and that an excessive number have been deliberately and systematically—an excessive number of that class have been deliberately and systematically selected for inclusion on the juries.

—Ch. Tr. 1387—

Now, without being able to obtain from this witness evidence as to his economic standing, which is the best evidence of that standing, your Honor is ruling in effect that it is improper in this court to establish the economic status of a person called for jury service. And we say if you do not allow us to establish that economic status you are denying us due process of law, in that you are not allowing us to show that the jury list established in this court from which grand and petit jurors are drawn, are not truly representative of a cross-section of the community. In making that determination it is necessary to place before the Court the economic status of the witness.

Now, the Court has said something about the question of not getting the exact financial status. The Court seemed to be satisfied by the fact that the witness owned a home in Riverdale or Fieldston, that that indicated for the Court's satisfaction his economic status. It does not indicate that status to the extent that the defendants have to establish it under the law.

Now, we are perfectly willing to work out a range either of income or property ownings, establish a system of brackets under the supervision of this Court which would not lead to an individual detail-

—Ch. Tr. 1388—

ing of the money that a man has in a bank or a safe deposit vault or invested in his business or in his home, so that the economic status can be established by reference to a range. If that can be worked out by stipulation with Mr. McGohey we are willing to do it, or, at least, on behalf of my clients I am willing to do it; but if this Court will not allow a determination of economic status from the source which is the best evidence; then your Honor is denying us our rights in this proceeding without due process of law.

Mr. Sacher: May I make one observation, your Honor?

The Court: You may argue in extenso.

Mr. Sacher: Well, it is not a question of arguing in extenso. I think what is being discussed here now will really determine the extent to which the inquiry will be conducted.

I heard your Honor say a few minutes ago that the witness did not look like a banker.

The Court: No, I said he did not look like a mechanic.

Mr. Sacher: Oh, I beg your pardon. All right.

Now, the point I want to get at is this, that what the decisions of the Supreme Court are concerned with are not the appearances, for I have seen many

—Ch. Tr. 1389—

workers and mechanics who look a darn sight more handsome and more personable and pleasant than a lot of fat bankers.

The Court: Well, we won't go into the question of how good-looking everybody is. We might not come out so well on that.

Mr. Sacher: That may be. But I am not interested in that now. I want to stick to the facts of the case and the law of the case; and what I am saying to your Honor is the following, that the Supreme Court of the United States in the Ballard case and particularly in the Glasser case said in so many words that the grand and petit juries of our country may not be made the organs of special economic, social, etc., classes.

We have announced that our purpose here is to establish beyond all reasonable doubt that these grand and petit juries in this district are organs of certain economic, social classes. We are concerned with demonstrating that this witness falls within a certain economic class. If you bar questions which are concerned with demonstrating the category of class into which he falls, then I say to your Honor that what is happening here is that the foundation for the establishment of the challenge will have been removed. And I therefore would respectfully urge upon your Honor that what we do here is to allow the question to proceed, because,

—Ch. Tr. 1390—

after all is said and done, the inquiry as to what the man owns, as to what he has, as to what his income is, as to what the value of his house is, as to what he earns per week or what he reaps in profits and dividends and unearned increment, so to speak—all that has probative value in establish-

ing his economic status. And I therefore submit that since that is the best evidence—

The Court: That is just what you are not going to do, however.

Mr. Sacher: What is that, your Honor?

The Court: That is just what you are not going to do, however.

Mr. Sacher: Well, let me make one thing clear: your Honor said that you were going to conduct a hearing, and I tell you now if what you are going to do is to prevent us from asking these questions and proving the fact, then this hearing is no hearing; it is just a sham and a pretense designed to prevent the establishment of those facts which will prove that the system is precisely what we say it is.

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New York, January 26, 1949

—Ch. Tr. 1522—

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Mr. Crockett: The telegram is as follows:

"On my behalf please read following telegram sent to Judge Medina into record: 'Re: US v. Foster. Actively engaged tomorrow (Wednesday)

—Ch. Tr. 1523—

morning'"—

This telegram by the way is dated January 26 at 12.49 a. m.—

"Actively engaged tomorrow (Wednesday) morning (11.30 a. m.) in US Court of Appeals District Columbia Circuit Case #9813 for respondent whom I have represented in said case for over 18 months, long trial and many issues on appeal. Herewith renew request for one day adjournment originally made by phone Jan. 24th after notice from Washington counsel when you denied appointment for discussion in presence of US Attorney. Deplore"—

The word here is spelled "D-e-p-e-t"—

"Deplore absence but conceive duty to client requires presence in Appeals Court. Case was previously scheduled Jan. 17, but adjourned at my request because of this trial. Call attention to Court's statement at close of Friday session that Court will defer to attorneys' engagements in appeals cases of long standing.' Abraham J. Isserman, Attorney for Gilbert Green and John Williamson."

In that connection I should like to remind the Court that your Honor stated the other day that it was not only expected that a District Court would give way

—Ch. Tr. 1524—

to a Circuit Court but that it was more or less required that that be done. I do not purport to be quoting your Honor directly, but that is the sense of what the record indicates. I understand from Mr. Isserman that he did contact your Honor's office, more or less just as your Honor has indicated, and requested that he be given an adjournment of just one

day in this matter. I know as a fact that he did talk with the clerk of the Circuit Court of Appeals in Washington and had his case down there postponed from January 17th so as not to conflict with his activities in this case. Under the circumstances I would like to suggest—I do not offer it as a motion—but I certainly do suggest to the Court the propriety of adjourning this proceeding until tomorrow morning, at which time Mr. Isserman will be back.

The Court: Do you really think any prejudice will come to Mr. Green and Mr. Williamson by proceeding today, with so many of you counsel here to carry on—

Mr. Crockett: Your Honor has just made one ruling which I think most certainly will prejudice those defendants in the absence of their counsel, and that was your Honor's ruling in effect directing the method by which we shall proceed to try this chal-

—Ch. Tr. 1525—

lenge. I certainly do expect to be heard on that, and I am sure that if Mr. Isserman was here he would want to be heard on it. It goes to the fundamentals of this whole case.

The Court: I think we can profitably spend the rest of the day listening to the arguments that the rest of you lawyers have to make on the matter that I have, as you say, indicated what I would rule. And then Mr. Isserman, when he gets back tomorrow, will let us have his views, and I shall make no ruling in the matter until I have heard what he has to say. You know what I am contemplating. You each will doubtless desire to argue at some length about it.

You also each of you desire to argue at length on the matter of a motion to disqualify me and the other judges, so that we can spend today listening to your arguments, which surely cannot prejudice the two defendants whom Mr. Isserman represents, and then tomorrow we will hear what he has to say.

Mr. Crockett: My suggestion, your Honor, has to do with even the propriety of continuing in this proceeding with two defendants who are not represented here by counsel. I could cite to the Court some cases in support of the position I take, but I do not believe it is necessary. So far as the argument is concerned, I think the Court is aware that my arguments are usually pretty short and to the point, though I must

—Ch. Tr. 1526—

confess they have not been any too convincing to your Honor—

The Court: Yes, much better than Mr. Sacher and Mr. Isserman who have been—well, shall I say, prolix and vociferous and repetitious, but all in good taste, and I have listened, although I must say, as I said a few moments ago, that the thought has finally entered my mind that all this business that has been going on is just a series of wilful and deliberate maneuvers for delay.

Mr. Sacher: I resent that and I want to deny it once again. I want to say that the Court's assertions, unfounded in evidence, are entitled to no more weight than lawyers' statements are, and I want to deny as unequivocally as I know how this statement, and I want to say, your Honor, that we want no more talk or argument this morning. Let us have the witnesses.

We want to call them, dispose of them, call one right after the other, as expeditiously as possible.

The Court: Now, let me see if I understand that. You say let us go ahead, call the witnesses at once.

Mr. Crockett says no, we must not go further because Mr. Isserman is away. Mr. Isserman's two clients say "We protest and desire to have no further proceedings in the absence of our counsel."

Mr. Sacher: If you will give us a little time I think

—Ch. Tr. 1527—

we can straighten that out and come to your Honor with a unified decision on the matter.

The Court: Now you are talking. If you can in the course of a short recess get yourselves organized here, which I think is a very sensible thing to do, talking with the clients of Mr. Isserman, perhaps we can go ahead, so I will take a ten-minute recess.

Mr. Sacher: Thank you.

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—Ch. Tr. 1777—

New York, January 27, 1949

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The Court: Would you care to indicate to me the course of the proof that you expect to make?

Mr. Gladstein: I would prefer not to state that as of record at the moment. But I am rather sure the evidence will be regarded by the Court as material and quite important.

The Court: I made an observation yesterday that I desire to repeat for your information. You may

remember that back before the trial started when we had some motion being argued up in the admiralty term, I heard a number of lawyers for the defendants excoriating an article in the World Telegram, I think, which had predicted some sort of antics for delay, and you were all very vociferous in protesting that that was a horrible accusation and that nothing of that kind would possibly happen. And I made a statement on the record that up to that time I had seen nothing done by any of the lawyers that I thought could warrant any such characterization.

Now, after a week and a half or so of this proceeding here, and during your absence I read over the record rather carefully and the thought did enter my mind that there was a deliberate, wilful and con-

—Ch. Tr. 1778—

certed effort being made by counsel for the defendants to delay the case by various expedients. I also said that I was extremely reluctant to think that any lawyer would do such a thing and that I would, and I did, put the thought out of my mind.

I mention it now so that you all may know that the thought has occurred to me. I should not want to later have some question come up and have any misunderstanding.

And so we will adjourn now until tomorrow morning at 10.30.

Mr. Gladstein: Before your Honor adjourns may I say just one thing, your Honor. I haven't read the transcript, but I don't have to read the transcript to be able to say to your Honor in all sincerity and

honestly that, speaking for myself and for those of the attorneys in the case, whom I have come to know and with whom I have talked, never at any time has there been any suggestion express or implied on the part of any of us to use any tactics or maneuver whatsoever for delay. To the contrary, your Honor, the challenge to the jury system here was filed not for the purpose of delaying the holding of a trial but in the fullest faith and confidence that an im-

—Ch. Tr. 1779—

partial consideration of what we had to offer would definitely result in the outlawing of the jury system here and in the quashing of the indictment. Because we feel satisfied, confident, that that kind of appreciation of our evidence can result in no other thing than the quashing of those indictments. Lawyers who present that serious a case do not do so, your Honor, for the purpose of delay but because they believe the evidence shows that they are right. And in so far as it may have seemed to the Court at the time—

—Ch. Tr. 1780—

The Court: Well, so many things have happened that seem, as I read back over the record, hardly consistent with anything other than a concerted and deliberate and wilful effort to delay. But I have told you that the thought merely occurred to me and I have put it out of my mind for the present. I wouldn't want to have something come along later and have anyone fail to understand that there is this interpretation of what has been going on. I do not say it is the right interpretation; it may well not be.

And all I do say is that the thought for the first time came into my mind and I put it out.

So we will adjourn now until tomorrow morning at 10.30.

Mr. Sacher: I want to state on the record, however, that I deny what your Honor said.

The Court: You don't need to shout, Mr. Sacher.

Mr. Sacher: No. I resent—

The Court: It is possible to address the Court occasionally without shouting.

Mr. Sacher: Yes. Your Honor in a quiet manner is picking out a point which will result in certain headlines tomorrow morning. For the record I want to make it clear that I have done nothing and will never do anything to delay or hinder the progress

—Ch. Tr. 1781—

of this case. And whatever I or any other counsel in this case have done or has done has been directed solely to the achievement of the end of proving that this jury system is bad.

And I think, your Honor, that there is no justification for closing every day's session with the observation as to what thought was entering your Honor's mind concerning our state of mind.

Mr. Crockett: If the Court please, may I be heard?

The Court: Yes.

Mr. Crockett: It so happens that I also read the record during the brief holiday period that we had, and with all due respect to your Honor I notice that there was more comment on the part of the Court than there was for example on the part of the United

States Attorney, and more comment than there was on my part.

I have given quite a bit of thought to all of these continued references to delay, delay, delay, and I must repeat what I said this morning: that we have spent the better part of this day arguing about something that might very well have been taken care of by letting those jurors take the stand and complete their examination. By that time Mr. Gladstein would have been back and we could have gone right on

—Ch. Tr. 1782—

with the other character of proof that your Honor seems to desire that we start with in the morning. That is all I have to say, except we deny—

The Court: What did you say about what I desired?

Mr. Crockett: I understand that your Honor desires a different type of proof tomorrow morning.

The Court: Not only desire—

Mr. Crockett: You say you don't want any more jurors—

The Court: (Continuing) I have ruled that I will not hear any more of the petit jurors. And so, whether you desire or not, you will proceed with the other phases of your proof or you will rest and take the consequences.

Mr. Crockett: I can assure your Honor, speaking for myself, that I have no intention whatever to rest at this point. And I do not intend to rest until I have sufficiently established the systematic exclu-

sion of Negroes, even if I have to call every qualified Negro in Harlem down here and make an offer of proof on his part.

The Court: Well, that will take some little time.

Mr. Crockett: I agree, your Honor.

—Ch. Tr. 1783—

The Court: Do you propose to do that?

Mr. Crockett: I said, if necessary to prove my case I would do that.

The Court: You know, on numerous occasions I have asked counsel for some indication of the proof they expect to offer, which is a common question in litigation, and one of the things that has impressed me has been the persistent refusal of counsel to inform the Court as to what they expected to offer or to show. It was a small thing in its way, but it hasn't made a favorable impression upon me. However, you may come to that in due course.

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—Ch. Tr. 2420—

New York, February 3, 1949

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The Court: I have already indicated several times that whenever I make a ruling adverse to any of the defendants or their counsel each of the defendants is deemed to have excepted thereto, and to get the benefit of the exception, unless some counsel desires to rise and say that he does not desire the benefit of the exception.

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—Ch. Tr. 2469—

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Mr. McGohey: Mr. Wilkerson, will you please keep your voice up a little?

The Court: I can't hear him and I am sitting right alongside of him, he whispers so much.

Mr. Gladstein: I heard him, Judge, and I am a good deal further away from Mr. Wilkerson than you are, and my hearing isn't as sharp as it used to be.

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—Ch. Tr. 2494—

Mr. Sacher: I repeat, this is an Alice in Wonderland procedure. We always get the sentence first and then the trial. Now, if we would just get back to ordinary procedure with trial first and sentence afterwards, this might be a little bit more real—

The Court: I scarcely think that that sort of language comports with the dignity of a lawyer addressing the Court—

Mr. Sacher: I did not mean any disrespect, your Honor.

The Court: —except perhaps in jest.

Mr. Sacher: You hear one of us, you rule, and then it becomes necessary to apply to your Honor constantly for reconsideration, and for once we would like to ask for consideration instead of reconsideration, and I am trying to argue something now—

The Court: You will completely refrain from further argument along this line.

Mr. Sacher: Then may I address myself to the merits of the argument on this question? What I

—Ch. Tr. 2495—

wish to say is the following: that the table which we presented as part of our challenge indicates that there is a correspondence between the size of the Republican vote in each Congressional District and the number of jurors called from that district for service. And I have illustrated, for instance, in the case of the 17th where the Republican vote is 53.2 per cent—

The Court: If you are determined to do what I have just told you not to do—

Mr. Sacher: I didn't understand you. Is that what you asked me to refrain from?

The Court: I asked you to refrain from, under the guise of argument, putting in the very figures I have ruled out in questions to the witness—

Mr. Sacher: After all, there is no jury here, your Honor.

The Court: Now, if you insist, you must, of course, take whatever the consequences are.

Mr. Sacher: Your Honor, may I say this: I have no objection to taking consequences if the occasion is one which justifies the taking of consequences. Now, if all your Honor says is you don't want me to read from a certain document, I hardly think that that is important enough to justify the consequences. I don't think the liberty of my clients is involved in this specific thing.

* * * * *

New York, February 4, 1949

—Ch. Tr. 2541—

Q. Have you in the course of your legislative experience been concerned with the problem of housing in your district? A. I have.

Q. And how did that concern manifest itself?

Mr. McGohey: I object to this line of questioning—

The Court: Sustained.

Mr. McGohey: —as irrelevant.

Mr. Isserman: Will your Honor hear me on it?

The Court: No.

Mr. Isserman: I would like to offer to prove that if this witness would be allowed to answer he would answer that he was concerned with a study of housing—

The Court: Now, Mr. Isserman, instead of following the customary procedure, where an attorney asks a question the relevancy of which appears on its face or the irrelevancy appears on its face, the Court rules and there is an end to it—in this trial

—Ch. Tr. 2542—

counsel, that is to say you and your colleagues, have developed this new business of proceeding to then make an offer of proof in which you state on the record the answer that you expect to get. And I am not going to permit that. This is just a preliminary question of little significance.

Mr. Isserman: Well, it is—

The Court: And I have ruled against it. I will hear no argument. I will hear no offer of proof as to this question.

Mr. Isserman: Will your Honor hear the cases bearing on offers of proof which indicate that this is appropriate under the circumstances?

The Court: No. I think I am pretty familiar with the elementary principles having to do with such matters. You are just qualifying the witness now for something, and I do not regard that particular inquiry as of any moment. So you go right ahead with the next question.

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—Ch. Tr. 2544—

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Q. Now can you tell us how long these houses and projects have been in existence?

Mr. McGohey: Objection, your Honor.

The Court: I don't quite get the point of that. If there is some point to it I might allow the question.

Mr. Isserman: The point is, we want to show the existence of these houses during the period when jurors were drawn and the composition of the persons in those houses.

The Court: And I suppose that, in turn, will lead to our dragging through all the different changes in construction in the district from 1940 to date.

I think I will sustain the objection.

Mr. Isserman: Will your Honor hear me on it?

The Court: No.

Mr. Isserman: Well, I would like to object to your Honor's characterization of the testimony by the use of your Honor of the expression "dragging through." We are trying to present evidence here, and I would like to argue my right to ask this question and to put on record what I intend to prove by it.

The Court: Yes, that is what I ruled you may not do.

Mr. Sacher: Your Honor, it seems to me that the

—Ch. Tr. 2545—

interrogation as to the witness's qualification is necessary not only to qualify him but to establish the weight that is to be attached to his testimony, and it seems to me that Mr. Isserman's inquiries are directed not only to qualifying the witness but to show an extent of familiarity which will give the weight which ought to be attached to that testimony.

Mr. Isserman: And I might say, your Honor, much more than that, we intend to show that these two particular housing projects here—

The Court: Mr. Isserman, you may not recall but I have ruled that you may not state anything further as to this line of proof. You will proceed. You have your exception, and you may go on to some other subject.

Mr. Isserman: Do I understand that I may not ask one question about the housing projects to which the witness has referred?

The Court: That is right.

Mr. Isserman: And that your Honor will hear no other proof in respect to that?

The Court: Well, I may later on after we have more evidence. That is something I will decide then.

Mr. Isserman: I will make an offer of proof, then, if the Court please, as to these two housing pro-

—Ch. Tr. 2546—

jects to the effect that if the witness were allowed to answer this question and the following questions which would be put concerning these houses, that these houses contained approximately—

The Court: Mr. Isserman, you are doing just what I told you not to do. Now that has happened so persistently here in this trial that it has made a very definite impression on me. You may remember that some time ago I had occasion to remark that I felt that there had come into my mind for the first time a thought that a wilful, persistent and deliberate attempt was being made for delay. I can find no other explanation for the way counsel have been conducting themselves in dragging this matter out; and in paying no attention to my rulings, no matter how trivial and inconsequential the particular matter may be. Now I hope you will bear in mind that matter because I may be literally forced to take some sort of action here merely to protect the administration of justice from frustration. And so I hope you will now proceed to some other subject.

Mr. Isserman: I object to your Honor's characterization of the conduct of counsel; to the statement that this is an effort to drag this matter out; to the statement that this is a persistent effort at delay,

and state for the record that it is a persistent effort

—Ch. Tr. 2547—

to put the facts in evidence and to protect the rights of my clients to the point at which I am certain that the Court has ruled that I may not proceed further. It was not clear from the Court's rulings, particularly the Court's statement that the Court would come to an offer of proof later, when I asked if the Court was precluding offer of proof, and the Court did not state that it was, that I continued to make it. I am now convinced that this Court will not allow me to make an offer of proof on this subject, and I will therefore desist.

Mr. Gladstein: Your Honor, may I say something about offers to prove?

The Court: You may not.

Mr. Gladstein: But, your Honor, I would like to suggest some cases to your Honor that you ought to look at—

The Court: Well, I have had that suggestion addressed to me a little while ago and I have rejected it. Now I think perhaps you gentlemen would do well to let the matter rest as it is now and proceed with the interrogation of the witness so that we may get some testimony relevant to the issue that is before me.

Mr. Gladstein: If the Court please, there are cases and cases which show that unless counsel makes an

—Ch. Tr. 2548—

offer of proof—and the offer is not required to be in writing—

The Court: Mr. Gladstein, did you understand that I indicated that I did not desire to hear any further argument on the point?

Mr. Gladstein: All right. I understand, your Honor, except that I wanted to call your Honor's attention to a specific authority—

The Court: Yes, and that is what Mr. Sacher wanted to do just a little while ago.

Mr. Gladstein: This was on another matter entirely. We are now talking about offers to prove.

The Court: I am not disposed to hear any argument or hear any suggestions at this time, and I direct that Mr. Isserman proceed to interrogate the witness on some subject other than this low cost housing to which he has been addressing certain questions.

Mr. Gladstein: My only suggestion then, is this: since your Honor won't permit me to refer to the authorities, then I refer to a practical suggestion, and that is if instead of consuming time in arguing as to whether or not we have the right to make the simple statement for the record as to what the witness would say if he were permitted to answer the

—Ch. Tr. 2549—

question to which the United States Attorney has objected, and which objection has been sustained—if instead of doing that we were simply allowed to follow the normal, usual routine procedure that takes place even before juries. Many a time a question is asked—

The Court: You see, Mr. Gladstein, I am the one who has to decide about procedure here; and I hear

from time to time from you and your colleagues how wrong I am and how little I know of procedure, and perhaps you are right; but the common method is for counsel to state his position, the Court rules, and then go on. If there is error then it may be corrected.

Mr. Gladstein: Yes—

The Court: So you will please desist from further argument.

Mr. Sacher: Does your Honor—

The Court: Now Mr. Sacher, I do not desire to hear you now, so—

Mr. Sacher: No. I am not going—

The Court: —so please—

Mr. Sacher: But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor is aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congress-

—Ch. Tr. 2550—

man Marcantonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial; and I say—

The Court: Did I say that?

Mr. Sacher: Well, you imply that very broadly. If your Honor wishes to deny it I shall be glad to have the denial. But I got the impression very distinctly that your Honor's observation was made just on the threshold of the Congressman's testimony and that it was designed to color the effect and impression to be given to it, and I do not believe, your Honor, that that is appropriate.

The Court: If you are only trying to provoke me, Mr. Sacher, you are wasting your time.

Mr. Sacher: I am not. I am provoked because you characterized our conduct and I am simply rising to reply to it. I did not characterize your Honor's conduct. You have characterized ours.

The Court: That is what the Court is supposed to do—

Mr. Sacher: I don't think so.

The Court: —when there is occasion for it. Now, you vigorously deny it. No counsel who I have ever known to misbehave himself says that he admits that he is misbehaving. Naturally, the more you have in

—Ch. Tr. 2551—

stalling and delaying tactics the more vigorously the man proceeds to deny it and uses up more time. I don't expect anybody who does something of that character to admit it, but I think mine is the function of making the decision.

Mr. Sacher: Well, ours is not the function to stand here and be accused by your Honor. I submit that that is not according us a fair trial when throughout these proceedings you persist in characterizing testimony whose materiality and relevancy you have not yet ascertained—you proceed to characterize it on its threshold as constituting stalling and delaying; and I submit, your Honor, that the proprieties would require that the Court exercise the same restraint that counsel is asked to exercise.

The Court: Well, you see, you and your colleagues have apparently adopted a new technique in criminal cases by which instead of the defendants who are

indicted being tried, the Court and all the members of the court are the ones who must suffer the excoriations and accusations of counsel. But I think, perhaps, with patience there will be an end. So you will please let the matter drop there, and Mr. Isserman will proceed with his questions.

Mr. Isserman: I will proceed, your Honor, but I

—Ch. Tr. 2552—

am again constrained on behalf of my clients to object to your Honor's remark characterizing the questioning which I am indulging in, or suggesting that the questioning is a stalling and delaying tactics, and to the description of this challenge to a jury, which under the law we have a right to make on behalf of our clients, as a new technique—

The Court: You have been at it three weeks now. I think possibly if you go on arguing this way we will be here the rest of the year on this challenge. But I think I shall take some steps to prevent that.

Mr. Isserman: I would like to complete my objection to the characterization of the jury challenge as a new technique, and your Honor's last statement that your Honor will take steps to prevent what is merely our effort to put in evidence the facts, and the fact that it takes three weeks or ten, your Honor, makes no difference in the administration of justice.

The Court: Well, perhaps we had better let each one of the counsel for the defendants say a word or two now, because they look as though they desire to state their positions too.

Mr. McCabe, would you like to say something?

Mr. McCabe: I had not intended to say anything,

your Honor, but as long as your Honor invites it I

—Ch. Tr. 2553—

would like to express a thought that has been going through my mind for several days: your Honor will recall that your Honor criticized me several times and criticized fellow counsel for referring to the jury system in the Southern District of New York in terms containing many adjectives, such as corrupt, illegal and unfair.

The Court: Did I criticize you for that?

Mr. McCabe: I think you did, and I think your Honor said "You will please observe that merely by your calling it corrupt or illegal or unfair that does not make it so."

The Court: Yes, and I heard so much repetition of that that I got the impression that it was being made for consumption out of the court instead of in the court, and that perhaps some of you thought that this idea of repeating accusations of that character, however extravagant, might have some effect elsewhere; but I do not remember criticising you for making the charge that you have made here. You have a right to do that, and that is what we are trying out.

Mr. McCabe: You see, your Honor, since that was so far from our minds I wondered how that came to your Honor's mind, and now it has become—

The Court: It might be prejudice, I suppose?

—Ch. Tr. 2554—

Mr. McCabe: No, it has become clear to me that your Honor is doing the very same thing. Your

Honor by constantly referring to our tactics as delaying tactics; by referring to evidence which seems to me to be very clear and precise, as being confusing, and referring to gaps in the testimony—I think that your Honor seems to have in his mind doing the very thing which you, I think unjustly, indicated that we might be doing. It seems to me that your Honor's words, that constant repetition of our new techniques and delaying tactics, and dragging things out and rambling on, that that is addressed—

The Court: Well, maybe I do ramble a little now and then, but I think that may be the privilege of the Court.

Mr. McCabe: Yes, but I say that it seems to me that that is what is in your Honor's mind, and that also may very well be addressed to someone outside of this courtroom, and I think that the record, if reviewed by some other authority may indicate unusual degree of tolerance in the face of particularly annoying tactics, which I don't think we are guilty of.

. . . . .

—Ch. Tr. 2620—

Mr. Isserman: If the Court please, I would like to respectfully object to your Honor's remarks in characterizing the effort we are making here and in indicating that the general proof will not be accepted while at the same time the specific proof which is available is also not received. I was beginning to point out to the Court—

The Court: Well, I thought, Mr. Isserman, that when you came to have the Congressman testify to the general complexion of his district that that was all right. Now when you come down to his study of literacy or the intelligence of such a large number of people, I regard it as of no value.

Mr. Isserman: But he knows those people, your Honor.

The Court: That is what you say.

Mr. Isserman: That is what he says.

The Court: That is what he says.

Mr. Isserman: And that is the fact.

The Court: And I must draw conclusions when a man says that he knows—what is it?—104,000 voters and 297,000 people in there; I must draw my own conclusions. And from my own rationalization of it I have excluded his statement, or the questions that are seeking to elicit his statements about his knowledge of the intelligence and of the literacy of

—Ch. Tr. 2621—

such a large number of people.

Now you take your exception and you are protected. If I am wrong, why, that is something that—

Mr. Isserman: I was in the middle—

The Court: —that you can have corrected.

Mr. Isserman: I was in the middle of my objection when your Honor interrupted to misconstrue a statement that I made. I said, conditionally—

The Court: I wish you would not say that I do that, to misconstrue.

Mr. Isserman: It seems to me to have been misconstrued.

The Court: That seems an impertinent thing. Mr. Isserman, that seems an impertinent thing. You are an experienced lawyer and you know better than to do that.

Now, you lawyers have been at that here for three weeks, perhaps to provoke me—I don't know what the reason may be. But I do know that if you keep it up some day, perhaps now, perhaps hereafter there will be a time of reckoning. Now, please don't do that.

Mr. Isserman: And I would like now to object to your Honor's characterization of my comment.

Now, the statement that I was making—

The Court: Well, when you charge me with deliberately misconstruing something I regard that as impertinence.

—Ch. Tr. 2622—

Mr. Isserman: I did not say it was deliberate, your Honor. But I said it seemed to me to be that. But, in any event, what I was saying was this: I said if this were a small community the method of proof, as indicated by the cases, would be to call the persons directly involved. Your Honor has thus far conditionally ruled that your Honor would not allow the calling of those persons who would give the direct evidence on their status.

The Court: There is no condition about it. I have said positively that I won't let you do it.

Mr. Isserman: Then your Honor has in effect ruled that this would not be allowed.

The Court: I have ruled that this idea of calling every member of the population or every member

from Mr. Marcantonio's district or every voter or every inhabitant from any other district I will not permit, and I won't. And if it can be stated any clearer than that so that you may have your exception in the most positive and unequivocal manner, I can try to restate it but I think that is pretty clear.

Mr. Isserman: Now I said, if it were a small community that would be the way of proceeding. Now, when the Court rules out the direct evidence

—Ch. Tr. 2623—

then there necessarily must be a falling back upon secondary evidence; and secondary evidence invariably, by its nature, is evidence which has not the sharp, direct, probative value of direct evidence.

The Court: Now, Mr. Isserman—

Mr. Isserman: Now, the reason why—

The Court: Let me say something to you. In every judicial proceeding that I am familiar with, and I have had a pretty large experience at the bar, when the Court indicated that it didn't want any more argument on a point the lawyer quietly desisted. If he chose to except he noted his exception and went on to something else. Here, perhaps in an endeavor to wear me out, which it is gradually doing, you keep that up, and you make the argument or arguments just as you are doing now. And I say, as I have said before, that that in my judgment is not the proper conduct of an attorney. It is extremely wearing on the Court in a trial of this kind. I suppose it will wind up by bringing me down. I hope it won't. I may have the strength to go on, and I hope I shall. But I tell you—stop it.

Mr. Isserman: I would like to take exception to your Honor's remark as an improper characterization of my conduct.

—Ch. Tr. 2624—

I would like to state my—complete my objection for the record if I may.

The Court: You insist on going ahead again, and all I can do, as I do not intend to make a rumpus about it, is to advise you again—please desist; and then, if you insist upon going on, why, you must take the consequences, whatever they may be.

Mr. Isserman: May I state my objection for the record?

The Court: You may not.

Mr. McCabe: May I respectfully suggest, your Honor—

The Court: Now it is your turn to go after me, is it?

Mr. McCabe: No, not at all, not at all. I am making a suggestion which I think is normal when the credibility or value of a witness's testimony is under scrutiny; that the Congressman's ability to testify as to the qualification for service on a jury of the hundred thousand persons in his district might well be subjected to the ordinary test of cross-examination rather than to arbitrary exclusion by your Honor. I should not have used "arbitrary," and I withdraw that. But exclusion without any test. I don't think your Honor should assume at the beginning that the Congressman is unable to

—Ch. Tr. 2625—

testify.

The Court: You know, Mr. McCabe, what we are talking about now is my excluding the question to the Congressman of whether he can tell us about the intelligence of these 297,000 people and their literacy. That is what you are arguing about.

Mr. McCabe: Wasn't that the point to which I addressed myself?

The Court: I say it does not need any argument. Now, some day somebody will read this record and they will see just how many times this same sort of thing has been going on, and somebody may be brought to judgment.

I am not going to attempt to use up my physical resources in telling you any more. So if you want to go ahead, after what I have said, I am not going to try to stop you. It is just too wearing.

Mr. Sacher: I have an observation to make, your Honor. I think it would be a misunderstanding of our purpose if the Court were to believe that we have any aim at any time to harass the Court or to do anything of impropriety. I think that while your Honor's health is of grave concern or great concern to yourself and those who are near to you, we lawyers have the responsibility of defending the freedom and liberty of twelve men and also to defend the right of their political party to exist, to

—Ch. Tr. 2626—

say nothing of their wives and children.

The Court: You may wear me down.

Mr. Sacher: No, it isn't a question of wearing you down.

The Court: But my own personal opinion is that you won't.

Mr. Sacher: Well, I don't intend to. I don't want to. And that is not a purpose that I have set myself.

The Court: The best way to avoid it is to sit down and let the matter rest with my ruling excluding the two questions.

Mr. Sacher: I just want to make this observation, if I may. Your Honor did not limit himself to a statement of ruling. Your Honor made an observation concerning the state of our proof, and you said because of the nature of Manhattan Island or of the Southern District it was impossible to do things in a certain way. And I respectfully submit that that evidences a misconception on the Court's part of the tendency of our proof. If New York is all that your Honor says it is, how come that this jury clerk always manages to find his jurors from the 17th Congressional District? And how come that this jury clerk never hits any one of the hundred thousand people from—

—Ch. Tr. 2627—

The Court: Now Mr. Sacher, just lower your voice a little bit.

Mr. Sacher: All right, your Honor, I am sorry if I am carried away.

The Court: That is the same sort of thing that you have repeated again, again and again, and that is the sort of repetition that I do not desire.

Mr. Crockett: If the Court please—

The Court: Ah, Mr. Crockett.

Mr. Crockett: I should like to address the Court.

The Court: Well, we are going to have every one of you take a crack at me, eh? Well, go ahead.

Mr. Sacher: I wish to note an exception.

Mr. Isserman: I take an exception to your Honor's remark.

The Court: Yes. Go ahead, go ahead. Take a couple of exceptions.

Mr. Crockett: As a matter of fact, I have been unusually quiet, because this morning when your Honor was inviting comment—

The Court: Yes, but now you see a chance to follow up a little harassment, and you can't resist it.

Mr. Crockett: No, it isn't that.

The Court: Yes, go ahead.

—Ch. Tr. 2628—

Mr. Crockett: I sort of feel badly over the fact that this morning when you invited comment you did not ask me to speak on the matter, and I thought that maybe at this time you would care to hear what I did think about it.

Well, I have only two observations to make. A day or two ago the Court pointed out that at the conclusion of the taking of testimony in this case no time would be allowed for the submission of briefs, and that if counsel had any authorities to which the Court's attention should be directed that should be done in the course of the presentation of testimony.

The Court: No; what I said was that when the evidence was closed there would be no additional time for briefs but that I would be glad to receive

whatever briefs might be submitted during the continuance of the proceeding. And I mentioned specifically the fact that you might busy yourselves over this week end in getting something up for me. I did not ask for more talk during the taking of the testimony.

Mr. Crockett: Well, I do not regard what I am saying as just more talk, and I am certain your Honor did not intend to characterize it as that.

The Court: When you read the record you will see that you said was that I had indicated that I

—Ch. Tr. 2629—

wanted some enlightenment orally during the proceeding, and, I consider that not what I said at all, and as I like to have the record straight I made the statement I just made.

Now, go ahead, without bringing in those other matters. If you have something to say about these two questions that I ruled out that have been addressed to Mr. Marcantonio, go ahead and do it.

Mr. Crockett: I seem to recall distinctly the Court's statement that "If you gentlemen have any authorities to which you are to direct my attention I suggest that you do it as we go along."

The Court: That is right. Not orally. Hand me up a memorandum with them. I can read.

Mr. Crockett: I appreciate that fact, your Honor, and I am very much aware of it.

However, what I want to point out is that the method of proof we have been pursuing here by calling an outstanding member of the community to testify concerning the approximate number of

people in the district, about their knowledge, the basis of qualification, for jury service, is precisely the type of proof that has been offered and accepted in the overwhelming majority of cases coming up from the South, where it was necessary to prove

—Ch. Tr. 2630—

negro exclusion.

In those cases counsel did not rely on the clerk and the court officials perhaps because he was aware of the characterization which Mr. Gladstein mentioned yesterday as having been made by your Honor. What normally happens is that they call in some outstanding person in the community to establish the fact that there are qualified Negroes in the country who had not served as members of the jury over a long period of years, and that proof has always been received, has always been considered by the Supreme Court.

In effect what we are doing here is calling the most outstanding person in the 18th Congressional District, who already has demonstrated his knowledge of the area and of the people in the area, and asking him to do precisely what has already been approved by the courts in similar cases challenging grand jurors in the South, which cases eventually went to the Supreme Court.

That is the first observation I wanted to make.

The second one I wanted to make is this, and that is that it seems to me that this proceeding is in the nature—

The Court: Have you some case, Mr. Crockett, to cite to me where the Supreme Court held that

it was all right to ask a politician or Congressman

—Ch. Tr. 2631—

a blanket question about the literacy of all the people in his district or the intelligence of all the people in his district? Have you such a case?

Mr. Crockett: I want first of all to object to the Court's characterization of Congressman Marcantonio as a politician.

The Court: Yes, and you will just answer as you did the last one.

Mr. Crockett: I wish also to object to your statement with reference to my own conduct. I think the record will show that on each occasion I have given the Court an answer when I was asked to give an answer.

The Court: I think not.

Mr. Crockett: Now in this case your Honor is requesting that I refer you to some cases.

The Court: That is right.

Mr. Crockett: That is what I want to do.

The Court: Go ahead and do it.

Mr. Crockett: The case of Patton vs. Mississippi is one.

The Court: Wait a minute. Penn vs. Mississippi?

Mr. Crockett: Patton vs. Mississippi.

The Court: What is the citation? And for once give me the official citation.

Mr. Crockett: If your Honor prefers, I will pre-

—Ch. Tr. 2632—

pare a list of these cases and give it to you in the morning.

The Court: No. I will check this one right now and we will see if there is anything in there on the subject.

Mr. Crockett: Patton vs. Mississippi is 332 U. S. 463.

The Court: Now, if you will just sit down and let me get a look at this book. (Reading.)

Well, I find absolutely nothing in that opinion which even remotely touches the subject under discussion.

So we will proceed now without any further argument, please.

Mr. Crockett: I should like merely to request permission to give the Court a memorandum, your Honor.

The Court: Well, if you are going on, Mr. Crockett, you are doing it in defiance of my request of you.

Mr. Crockett: I am not arguing; I am merely trying to get permission to submit a memorandum—

The Court: You are talking. Go on, keep it up.

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—Ch. Tr. 2683—

New York, February 7, 1949

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The Court: Well, you know, it is often that way when a lawyer asks a question and the Judge sustains an objection to it, that he would like to go

on arguing. But I do not desire further argument. I understand your contentions. Goodness knows, you have told me about them often enough.

Mr. Sacher: But your Honor has said that it will rest in your hands to say what weight, if any, is to be given to this report. And I am addressing questions designed to elicit answers which will give the highest and the greatest weight to this report, and that is what I am being prevented from doing. I cannot—

The Court: You are being prevented, that is right.

Mr. Sacher: Yes. That is what I am saying.

The Court: And that is what the Court is here for, to rule on questions.

Mr. Sacher: Does your Honor mean that if this man testifies—

The Court: I do not desire further argument, Mr. Sacher.

Mr. Sacher: I want to ask you a question.

—Ch. Tr. 2684—

The Court: And you were just about to raise your voice again. It gets so tiresome. Please don't do it.

Mr. Sacher: I will refrain. But I would like to ask you, your Honor, does not Honor hold that a conversation between this witness and the Chief Judge of the Southern District of New York concerning the characteristics of the jury system in this district would constitute hearsay, when this man is directed by his chief, who is the chief or director of an agency created by the Supreme Court of the United States, to ascertain this information from the only people whose duty it is to divulge the infor-

mation, namely, the senior judge and the various clerks—does your Honor say that statements made in the course of the performance of their duties constitutes mere hearsay?

—Ch. Tr. 2685—

The Court: I am not disposed to get into a controversy with you.

Mr. Sacher: No. I thought your Honor might help me and answer as to whether you regard that as hearsay. I can't regard any statement Judge Knox made whether here or before Congressional committees as constituting hearsay. I say that they express the practice, and however—

The Court: I suppose there is no way for me to stop you from going on talking, and, as I said before, I am not inclined to waste my strength in the effort.

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—Ch. Tr. 2694—

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Mr. Sacher: Now, I want to prove it to you, and the first step in proving it to you—

The Court: Don't prove it to me in the way you are now endeavoring to do—

Mr. Sacher: What you are doing—

The Court: —constant repetition and coming back to the same thing, Mr. Sacher, does not help one iota. You may be right; I may be wrong; but saying it over again, repeating and repeating, you asking the question, I sustaining the objection, will do more

than had been done when the first objection and the first ruling was made.

—Ch. Tr. 2695—

Mr. Sacher: You see, I ask for instance—

The Court: Well, you always use anything that is said as the jumping off point for some more argument, and I tell you on this point I do not desire argument.

Mr. Sacher: Well, I don't want to argue, but I would like to ask what is the occasion for appointing a man with a practical knowledge of the social, racial and economic groups of New York and their geographical distribution unless he is put there for the purpose of using that knowledge to exclude certain economic, social, racial and geographic groups?

The Court: You see, whenever I try to stop you your raise your voice—

Mr. Sacher: I am sorry—

The Court: —and you repeat again. Now you have said that same thing many times. I suppose you do it for some purpose other than is connected with this judicial proceeding. But as I said before, I am not disposed to go ahead and try and hold you down—

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—Ch. Tr. 2741—

Q. Isn't it true that you learned in 1942 directly from

—Ch. Tr. 2742—

the attaches of this court, particularly the jury clerk and the ~~commissioner, the jury commissioner~~, that in selecting citizens of this district for potential jury service the clerk's office and the jury commissioner were taking names directly from a private organization?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Isn't it true—

Mr. McGohey: I desire, your Honor, to press the objection against the form of the question because counsel is now attempting to testify.

The Court: Well, I think, Mr. Gladstein, it is sufficiently obvious that the attitude of the Court is and the rulings are against this line of questioning. So I think you had better turn to something else.

Q. Did you ever learn directly from attaches of this court, sir, whether or not an association called the Federal Grand Jurors Association of this district had been and was supplying to the clerk's office lists of names of people to be qualified as and selected for jury service?

Mr. McGohey: Objection.

The Court: Mr. Gladstein, that is the very type of question that I just told you not to ask.

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—Ch. Tr. 2839—

New York, February 8, 1949

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The Court: I may state that one of the reasons that you may assume exists as to all excluded evidence from now on is that I feel that there has been a wilful, deliberate and concerted effort here to de-

lay the proceedings. And I am going to see what I can do to prevent any further delay. I have been working up to that now. At first I couldn't think it possible, and then it began to dawn on me that maybe that is what was going on. And I mentioned it two or three times but it did not seem to have any effect. And finally it has come to my mind that such is the fact, and I so find.

—Ch. Tr. 2840—

And you may, among other things, as reasons for mysustajning the objections from this time on, add tha one.

Mr. Gladstein: I want to take an exception to the Court's remark and the implication of the remarks of the Court and to state in substantiation of the purpose of the offer that we are here seeking to introduce evidence, the facts concerning which will not be disputed, the tabulations on which are accurate and are being vouchsafed for by the witness and agreed to by everybody concerned—to show the nature of the system, how it operates, how it was intended to operate to select jurors here. And each of these pieces of evidence is directly, immediately connected with the issues that we present in our challenge. We say in the challenge, your Honor—

The Court: Well—

Mr. Gladstein: May I complete the statement?

The Court: Well, it has seemed to me that the record plainly demonstrates that if I permit you to do so you and your colleagues will go on and on and on, and we will still be trying this challenge

when the snow flies again next winter, and I am not going to permit that. I think such evidence as you put in indicates very plainly what you desire, and it just keeps going on and on and on, and I gather

—Ch. Tr. 2841—

that all this photostating that you are having done may well be a foundation for a prolonged system of week after week of going into every paper that was up there in the jury commissioner's office. And if you have any notion that you are going to do that, you might just as well know now that you will not.

Mr. Gladstein: Can I finish my statement?

The Court: Yes.

Mr. Gladstein: I want to say with respect to the two types of exhibits that have been offered this morning, first that dealing with the political character of the areas from which jurors have been taken in contrast with the areas from which jurors have been excluded, or on the way the voting population have been excluded systematically over a period of years from the juries of this court, that that evidence directly bears upon the charge that we make in the challenge, spelled out in so many words, that the system here has been operated in a way that discriminates according to a political basis.

With respect to the exhibit that has just now apparently occasioned the Court's remarks, I desire to point out—

The Court: What occasioned my remarks was your asking me what the reasons for my rulings were,

—Ch. Tr. 2842—

and I thought, as there were many reasons for the

last few rulings, I might just as well let you know that this dragging on, slowing down process that I have observed and have now found to be a deliberate and concerted effort, is one of the reasons for my rulings, and will be from now on.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: That is all right. I can't expect you to agree that you have been doing that.

Mr. Gladstein: Not only should your Honor not expect me to agree, but I deny that it is true, and I deny that anything in the record or outside the record warrants that statement.

Mr. Isserman: If the Court please, on behalf of myself and the counsel not here at the counsel table this morning, I object to your Honor's remarks and to your Honor's finding to the effect that the defense efforts to introduce evidence here has been a wilful and concerted effort to delay this proceeding.

I object also to your Honor's remark to the effect that if permitted to put in the evidence which is relevant and material to the issues here, and which we deem so, that we will be engaged in an endless proceeding which your Honor suggests might take

—Ch. Tr. 2843—

the balance of the year or more.

I object also to your Honor's remark to the effect that by the token that we are photostating certain papers in the clerk's office, that these papers will either be used for purposes of endless delay or that it means that every paper in the clerk's office, as your Honor indicates, will be offered in evidence.

At the same time we have to assert, and I do assert on behalf of the other counsel, our right and our duty to present that evidence on this challenge which we deem necessary and relevant, and that the evidence which is being offered is that type of evidence. We have been limited in many ways by the Court's rulings. We are faced with a difficult problem because of the size of the area with which we have to deal, and we are doing our best to present the facts as they appear from the result of our investigations.

There has been no intention, there has been no effort, there has been no action taken by myself as one of the counsel or by the others, to my knowledge, to create any situation in which there is wilful or deliberate or concerted effort to delay. What there has been, has been a deliberate and persistent effort and a concerted effort to place on this record those facts which bear on the challenge we have

—Ch. Tr. 2844—

made; and in a presentation of those facts we will have to continue our efforts, notwithstanding the Court's evident disapproval and notwithstanding the Court's ruling in that respect as just made, or the Court's finding as made.

And lastly we want to say that the Court's ruling in that respect and the Court's finding of a wilful or concerted effort of delay as a basis for the exclusion of evidence denies us due process of law in the presentation of the facts concerning this challenge.

The Court: It was a conclusion I came to most reluctantly and with regret.

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—Ch. Tr. 2973—

New York, February 9, 1949

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The Court: Well, probably it seems to you unimportant to determine whether the exhibit is accurate or not. Mr. McGohey is quite within his right in determining that matter, and I take it that is the purpose of these questions. You know, yesterday we found one of the charts was not accurate.

Mr. McGohey: Now, if your Honor please, may I have the last question to the witness read?

The Court: You may.

(Last question read.)

A. I would expect there to be none, but if you want me to look at each page I will be glad to and see.

Mr. Sacher: May we write any delay that flows from this to Mr. McGohey, please?

The Court: Well, Mr. Sacher, I consider that an impertinent comment and hope you will not repeat it.

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—Ch. Tr. 2993—

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The Court: Perhaps we can shorten this thing up and help you out a little bit about it. At the moment I am a little bit inclined to let him go ahead as to these names that he says are repeated, subject

to connection later. Now, if you have two or three other things of the same character, maybe we can dispose of them. If you would rather not tell me what they are, which is the course you gentlemen have pursued pretty persistently in this trial, why, I shall simply let the matter drop.

Now, what my inquiry is, what are the other things that you will attempt to bring out from Mr. Wilkerson besides the repetition of names?

Mr. Gladstein: Now, your Honor, I am not a small child. I am perfectly willing to state to the Court very candidly, as I always am, the character of the proof at any stage that I have to give.

The Court: Perhaps you will do it then.

Mr. Gladstein: I said yesterday that I had hoped, as a matter of fact, to complete Mr. Wilkerson's testimony before the day was over. But because of antics similar to the ones we have seen this morning on the part of the United States Attorney—

Mr. McGohey: I move to strike that out, your

—Ch. Tr. 2994—

Honor.

The Court: Strike it out.

Mr. Gladstein: (Continuing) —who says he can—

The Court: I don't know what on earth you can mean by that word "antics." There has been nothing here that could remotely be properly characterized in such a way.

Mr. Gladstein: I suppose that is a matter of judgment. And I was using the remark—

The Court: I think so. And, of course, I am the one who is supposed to be exercising the judgment.

Mr. Gladstein: Nonetheless, my point is this: that unless this question is withdrawn by Mr. McGohey with respect to whether or not a stenographer simply copies the name or the address in the office of the clerk from a jury panel, then obviously we are going to have to make that kind of comparison.

The Court: Now you remember what we are talking about. I asked you and I now ask you again, in addition to this matter of repetition of names what are the other matters that you expect to bring out from Mr. Wilkerson this morning?

Mr. Gladstein: I have brief testimony to bring out with respect to the 22nd Congressional district.

—Ch. Tr. 2995—

I have a few questions to ask him concerning testimony he has already given but which I think is not sufficiently precise and ought to be covered. And then I have brief testimony from him with respect to those factors that we once started to talk about that ought to be taken into account to determine the extent to which, if any, there is impact upon the occupational classifications that we have had testimony about, by reason of such factors as alienage, illiteracy, and taking into account the exclusion of those over 14 years old but under 21 who are gainfully employed.

The Court: All right. With that statement I will permit you to interrogate the witness in a general way as to what he did about this repetition of names, subject to connection.

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—Ch. Tr. 3033—

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By Mr. Gladstein:

Q. Now, Mr. Wilkerson, did you give attention to the impact of illiteracy? I believe you have testified to some extent on that subject and you made some charts, is that right? A. Yes, that is right.

Mr. McGohey: Now, if your Honor please, I make the same objection to this line of questioning. I haven't quite yet got the page in the record where we went over this, but my recollection is that we did.

The Court: I think I can find it in my notes in a moment, so if you will just pause for a brief interval, Mr. Gladstein, while I can see what I can find.

Mr. McGohey: I think your Honor will recall we had some exhibits put in consisting of the forms of examination that the State Board of Regents requires voters to take.

The Court: Yes.

Mr. Gladstein: That had to do with politics.

The Court: Here, I think I have it.

Mr. McGohey: Mr. Clerk, can you tell what date Exhibit 106 went in?

The Clerk: February 7th.

The Court: Yes. In the afternoon of February 7

—Ch. Tr. 3034—

this subject was covered. For instance, I have in here, estimated illiteracy in 1940 by race, Exhibit 106, native white, 1.1; foreign born white, 12.6; Negro, 3.9; others, 24.3; and a great deal of other

data on the subject. Now what is the use of going over it all over again?

Mr. Gladstein: I seem to recall the question was raised, and the witness was asked to have precise reference to sources, and there were some questions raised concerning a table that was marked for identification, and if I recall the colloquy we agreed to return to that subject later and supply the source reference. That is my recollection.

The Court: Then go ahead and show us the source reference and then be done with it. That is a perfectly proper thing to do.

Q. Did you prepare a memorandum on the question of the impact of illiteracy on your—

The Court: You know—

Mr. Gladstein: I am about to bring out—

The Court: You know, Mr. Gladstein, it is wonderful, it really is. You hear me; you appear to acquiesce; and then you go right ahead and do just the opposite.

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—Ch. Tr. 3105—

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Q. And will you tell us how that proprietor of a tailor shop is classified on that page 393? A. With the 360 symbol.

Mr. Sacher: I object to it unless it appears—

The Court: Please let him answer.

Wilkerson—Cross
Colloquy

Mr. Sacher: What are you worrying about, Judge? Do you think this case hinges on the little tailor on Amsterdam Avenue?

The Court: No.

Mr. Sacher: Is that the basis—

The Court: I am quite accustomed to instances where counsel who called a witness—

Mr. Sacher: May I ask for—

—Ch. Tr. 3106—

The Court: —constantly adopt stalling tactics and things of that kind, and I don't intend to have that here.

Mr. Sacher: May I then ask for permission to make the observation after he answers that I was going to make before?

The Court: Well, you have already served that purpose.

Mr. Sacher: What is the difference? I couldn't—

Mr. McGohey: If your Honor please, may I ask that the witness be directed to answer the question I have just asked?

Mr. Sacher: I object again on the ground that it doesn't indicate whether the tailor Mr. McGohey is speaking about is an employer of labor or not. And Mr. McGohey can't tell me or anybody else that anyone that employs ten employes in a tailor shop isn't a proprietor, owner and manager.

The Court: You have done just precisely what I told you not to do, and you have done that so many times that I will merely have it indicated on the record here that I am observing and noting. I ask

all of counsel to desist from comments in the guise of objections to questions which in effect suggest the answers to the witness under cross-examination.

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New York, February 10, 1949

—Ch. Tr. 3162—

Q. Very well. Now, you learned from those two paragraphs which you have just read—that is, when you read

—Ch. Tr. 3163—

this report originally you learned from those two paragraphs that you have just read that jurors whose names appeared on a panel might not necessarily serve as jurors for the period for which that panel was called, did you not? A. No. Indeed, I do not even remember reading those paragraphs because my reading of the Tolman Report some time ago was a cursory reading which had no impact or no use for the purposes that I was seeking.

Q. And you don't remember now? A. And I don't remember reacting to that at all.

Q. Well, you know now from reading it that jurors whose names appear on a panel do not necessarily serve as jurors during the period for which that panel is called, do you not?

Mr. Sacher: Just a moment. I object to the question on the ground that this witness, who did not write the report, is being asked questions in regard to the contents of the report, while when I examined the author of the report your Honor sustained objections to any inquiry concerning any part of

the exhibit. On the same grounds, I object to this question.

The Court: Mr. Sacher, let us suppose that the witness, as he states, read the report and saw from that report that by the common experience in the jury commissioner's office, jurors might be called

—Ch. Tr. 3164—

and be excused, and when they were excused they were put on for the next month. Don't you think that if he did that, if he read that, that it would be a curious circumstances that he should produce a list which purported to indicate that certain jurors were brought on again and again, when an indication of an excuse and coming back the next month would sort of reduce the effect of any such list? Perhaps if he knew those facts but got up the list, nevertheless, it might be a circumstance affecting his veracity, might it not?

Mr. Sacher: A short answer would be no.

The Court: Very well. Then I will overrule the objection.

Mr. Crockett: If the Court please, I would like to state an objection: My objection is that the witness is being cross-examined about matters that were not brought out in his direct examination; unless the United States Attorney desires to make the witness his witness, then I submit that this is improper cross-examination. I wish also to object to the Court's statement to the effect that the witness got up a list. I think the testimony indicates from the witness's own words that he was provided with lists by defense counsel.

Wilkerson—Cross
Colloquy

The Court: I meant Exhibit 37. That is the one I am talking about. That is the list, that is the ex-

—Ch. Tr. 3165—

hibit which he attested to the accuracy of, and that is what was being inquired into. I will overrule it. But I see we are getting back to the old system, so each one of you may proceed seriatim et singulatim.

Mr. Crockett: I object to the Court's characterization of my objection as getting back to "the old system."

The Court: Mr. Crockett, do you think that any reasonable person could suppose that there was anything improper in questioning this witness on the subject that he is being questioned about? Do you seriously think there is anything in the point?

Mr. Crockett: I do. I would not press the objection if I was not serious about it.

The Court: Well, the objection, as you stated it, seemed to me to be almost frivolous.

Mr. Crockett: But, your Honor, I sat throughout this entire proceeding and at no time has this witness been questioned about the Tolman letter.

The Court: No.

Mr. Crockett: The United States Attorney asked him had he read the Tolman letter, and his testimony is to the effect that he had given it a cursory reading; and now he proceeds to cross-examine him on the Tolman letter, which was not brought out on his direct examination.

—Ch. Tr. 3166—

Mr. Gladstein: If your Honor please, I desire to record an objection to the question asked by the

United States Attorney and to this line of inquiry upon the ground that it is incompetent, irrelevant, and immaterial, for these reasons: the testimony of this witness and the exhibits that were received in evidence in support of that testimony go to the proposition of establishing that in the first instance there is discrimination in the selection of jurors. It is wholly immaterial that thereafter, after the selections are made and the discrimination has been practiced and brought about, one or another or several of the jurors so called may for personal reasons seek to be excused from one particular panel. And the fact that upon being so excused those jurors are later utilized on some later panel, be it the following month or the following six months period or the following year, is by no means any basis for contending that there could be any weakness in the testimony given by this witness.

I therefore submit that the line of inquiry is immaterial.

Mr. Isserman: If the Court please, I rise singulatim and not seriatim—

Mr. McGohey: Now before Mr. Isserman proceeds—

The Court: I think it is both seriatim and singu-

—Ch. Tr. 3167—

latim.

Mr. Isserman: And rise for the sole purpose of objecting to your Honor's characterization of the conduct of counsel.

The Court: Well, the objection is duly noted.

Have you no argument to make on the point at issue?

Mr. Isserman: As a matter of fact, your Honor, I do have, and my objection would be on another ground, but your Honor has inhibited me, and I won't make it, and that is the precise reason for my objection to your Honor's comment.

The Court: If you are inhibited, Mr. Isserman—

Mr. Isserman: I am.

The Court: —it is a condition which has suddenly crept up on you.

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—Ch. Tr. 3172—

Mr. McGohey: Now, if your Honor please, I ask the Court to take judicial notice of this card, which is an official record of the court and is a card similar to Exhibit 8 which appears in the Tolman Report.

—Ch. Tr. 3173—

The Court: I do take judicial notice of it.

Mr. Isserman: I have an objection on two grounds: First, the card has not been identified; and secondly the use of this card is not proper cross-examination. The witness has not testified about cards; he has testified about an exhibit; he has answered questions on cross on the exhibit. If the Government cares to go further on the issue of this new matter, that is something for the Government's direct case, just as the matter which we sought to elicit from Mr. Wilkerson at this point is matter for redirect. This is going very far afield in cross-examination, and an effort by the Government to use cross-examination to put in its own case.

Wilkerson—Cross
Colloquy

The Court: Mr. Isserman, are you cognizant of the fact that I made a finding the other day that you and your colleagues had participated in a wilful, deliberate and concerted effort to delay the proceedings in this case?

Mr. Isserman: I am, and I made the objection to your Honor's finding, your Honor will recall.

The Court: Yes. Now you are doing it again.

Mr. Isserman: I object to your Honor's characterization of my objection.

The Court: I just want you to know that I find

—Ch. Tr. 3174—

that you are doing it again.

Mr. Isserman: I take objection to your Honor's comment.

The Court: And if these repeated objections on such grounds as have been stated here are continued I shall be literally forced to rule that on cross-examination objections shall be restricted merely to saying "I object." Now, I don't want to do that. But these objections we have been having here this morning are absolutely trifling. The questions are of such a character that there is no occasion to have any objections at all, and I wish you lawyers would desist from doing that.

Now, I am asked to take judicial notice of this card, which I do. If something is going to be done later on as to the use of it I can see now what it will probably be, and I would suppose it was entirely relevant and proper; but that is all I have been asked to do that you have been making all

these objections to, and I notice the smirking of Mr. Crockett and Mr. Sacher which, as I have observed before, a number of things of that kind—

Mr. Sacher: That is unrelated, your Honor, to anything that your Honor has said or done. I was talking to my client. I can't control my facial ex-

—Ch. Tr. 3175—

pressions when I hear a humorous remark from a client.

The Court: I have observed, Mr. Sacher,—

Mr. Sacher: And on the record, I can't control the facial expressions arising in the course of a conversation with one of my clients. Now, I can't live in a straitjacket here and control my face so that it will be pleasing to your Honor.

The Court: If you ever get so that you can control your face I am afraid you will be in a bad way. But however that may be—

Mr. Sacher: I don't think that is a nice remark to make either, even if it is only to a lawyer.

The Court: You talk and talk and talk. No amount of warning will suffice. No amount of finding that you do it with the deliberate effort for delay has any effect upon you. You keep on talking probably because you are so used to doing it and not being reprimanded for it. But I think we will reach a time in these proceedings when you will cease.

Now, I go on with what I started to say. The finding I made the other day was based not only upon occurrences that appear in the minutes but upon what I have observed in the conduct of counsel before me here, sneering, snickering, obvious indications of

one to another "Get up, it is your turn now, go at
—Ch. Tr. 3176—
it next, keep this thing going," and so on. So that I think perhaps before very long you gentlemen will appreciate that you should not do these things.

Now I have taken judicial notice of the paper, and we will proceed.

Mr. Crockett: If your Honor please, I was not in court at the time your Honor made this finding of dilatory tactics on my part. I desire to object for the record at this time. I desire first to deny your Honor's characterization of my conduct as smirking and sneering—

The Court: Well, that is what it was.

Mr. Crockett: (Continuing) And I feel restrained by the code of ethics and refrain from making my own characterizations of some of your Honor's conduct into the record at this time.

The Court: Well, if you have been restrained in characterizing my conduct it is a queer kind of restraint. You and your colleagues have called me about everything that a Judge can be called, and have charged me with corruption and bias and prejudice and many other things, and if you consider that you have been restrained in doing that, not once, not twice, not a dozen times—then I am afraid the record will not bear you out.

Mr. Isserman: If the Court please, I rise to ob-
—Ch. Tr. 3177—
ject to your Honor's characterization of my conduct at any time in this proceeding as either sneering or smirking. I also object to your Honor's character-

ization of any conduct on my part as suggesting "go at him next, keep this thing going." I have never done that. I have never engaged in any action which indicated that that was my intention. I have never had that intention. I have made objections, and when I make them I make them because I believe I should make them for my client.

As far as any charge or characterization of your Honor is concerned, if I have done it it has been done solely in a manner which the law provides in connection with protecting the rights of my client.

The Court: That is what you say.

Mr. Sacher: If you please, I wish to deny on the record so far as I am concerned each and every of the statements made by your Honor concerning me, if the remarks were designed or intended to cover my conduct—

The Court: They were.

Mr. Sacher: (Continuing) If they were, then I wish to interpose a denial very briefly to those charges, and I wish to state it to be my belief that the sole purpose of the statement is to prejudice us in the eyes of the people and of any higher courts who may come to review this record.

—Ch. Tr. 3178—

Mr. Gladstein: Your Honor, I wish to object to your Honor's characterization and statements in so far as they apply to me, and I deny the validity of those statements or that any basis for such statements exists.

Colloquy

The Court: Now I hope there will be a little less profuseness in the objections during cross-examination.

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—Ch. Tr. 3256—

New York, February 11, 1949

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The Court: You know, Mr. Crockett, I have tried in numerous ways here to make it clear that in view of the relatively same position of different defendants here that whatever ruling is made that may be adverse to one, the others may all get the benefit of it. And the same is true of any law points that are raised. I have thought from the beginning that that was only fair, and I made that statement, too, so that we might not have the hue of each lawyer in reference to each point because it seems so unnecessary. I do not want to say that it is in every instance not the right thing to do. For example, I felt with that question that came up late yesterday afternoon that it was one on which everybody might desire to ex-

—Ch. Tr. 3257—

press some views. But so many of the things have been utterly trivial.

And so I hope that what I have said and what I now repeat about rulings that may adversely affect anyone, all of the defendants have the benefit of it. It will not be necessary to say that you join in the views; it will be assumed that any adverse ruling is one which anyone of the defendants may take the benefit of before any Appellate Court; the excep-

tions will be deemed to have been taken by all, and the benefit of any legal argument made by one counsel will be deemed to inure to the advantage of each and every one of the defendants.

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—Ch. Tr. 3269—

Mr. McGohey: My purpose, so that here shall be no doubt about it, in asking the question in the form I did is twofold. First I desire by ascertaining the length of time that the witness has been a member of the Party to show a long association with the defendants in this case that would have some bearing on the question of his interest and bias in their behalf. Furthermore, if I am permitted to ascertain precisely the date which he joined, it may or may not transpire that at some other time the witness has testified falsely or answered falsely under oath with respect to that very same question.

Mr. Sacher: I move to strike the improper remark out, your Honor.

The Court: No, Mr. Sacher. Why should I strike

—Ch. Tr. 3270—

it?

Mr. Sacher: I think it is improper to make the remark, because the purpose of cross-examination here is not to lay the basis for another prosecution, assuming there even were any grounds for it, and I assert as strongly as I can there are absolutely none. But even if there were, this inquiry would be improper for that purpose. The purpose of cross-examination is to elicit the truth and not to lay a basis for persecution of a witness.

Mr. McGohey: If your Honor please, I move to strike that last remark.

The Court: I don't see—

Mr. Sacher: Let us see whether I get equal treatment with Mr. McGohey.

The Court: I do not see that there is much use in my striking things that are already said and on the record. I think I will just content myself with the ruling after I have heard the balance of your argument.

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—Ch. Tr. 3281—

Q. Were you ever a member of the National Committee of the Communist Party?

Mr. Sacher: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

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—Ch. Tr. 3287—

The Court: * * *

Now, I am going to allow the question. I don't want to hear any more argument.

Mr. Sacher: May I just have one moment, your Honor, and it is to say this: if the question were something which affected credibility which would permit your Honor to say whether the evidence or the testimony of the witness in its entirety should stand or be rejected, then I think that your Honor's position would be unassailable. But what you have

here is a quantum of evidence which indisputably consists of and rests on Government figures.

Now, in those circumstances it seems to me that an affirmative or negative answer as to whether the witness was or was not a member of the National Committee of the Communist Party gives your Honor no guidance as to what portion of his testimony has been adversely affected by that membership.

Does your Honor have a single notion as to what the seven per cent figure that the witness gave to you in regard to the deductions that must be made for those who are aliens, illiterates, between 14 and 21 and over 70, will be, if you know that he was a member of the National Committee? You won't know that. Consequently I—

—Ch. Tr. 3288—

The Court: Mr. Sacher, it will make a good deal of difference to me what the aggregate of all the factors brought out on cross-examination may add up to.

Mr. Sacher: That may be.

The Court: I do not say now, nor can any judge say how much one particular fact brought out on cross-examination is going to affect his judgment when he comes in the end to decide whether he believes the witness. Now, I am going to allow this question, and please don't argue any more.

Mr. Sacher: I won't, your Honor.

Mr. Gladstein: Our objection is noted, your Honor?

The Court: Yes. The objection is overruled.

Wilkerson—Cross
Colloquy

Mr. Isserman: If the Court please, I merely want to put on record my objection here of your Honor's characterization of counsel, of defense counsel yesterday as engaging in trivialities. I object to your Honor's remark to that effect.

The Court: Well, if that series of objections at the early part of the cross-examination of this witness did not relate to trivialities, the smallness, the minutiae that ordinarily come plainly within the Court's discretion on cross-examination, then I just

—Ch. Tr. 3289—

don't know any law at all. That is why I permitted so much discussion on this matter of whether the man is a member of the Communist Party, because I thought there was some substance to this question. The others I could see no substance in at all, and I intend, as far as I am able, to cut down that sort of triviality, and one of the reasons is that I have been so persuaded that you lawyers are just attempting to make a mockery of justice here, and I won't have it.

Mr. Isserman: If the Court please, I object to that remark.

The Court: Well, that is right. Every time you get up to do some more of it you will get some more right back.

Mr. Isserman: Your Honor, I am sorry that your Honor is taking this position, but I certainly will object every time your Honor makes a statement on this record which I believe goes against the interests of my clients and affects my right to defend my clients.

Wilkerson—Cross
Colloquy

The Court: You can keep objecting and adding your objection to the others, after I have so repeatedly said that the advantage of any adverse ruling will inure to every single defendant, you can keep getting up and keep saying that you join in the objection, and you do this and you do that, but the effect of it all is confirming my view that there

—Ch. Tr. 3290—

has been this deliberate effort here to make a mockery of justice and to, in effect and in the aggregate, sabotage the administration of justice, and I just won't have it. That is all there is to it.

Mr. Isserman: I am sorry, I object to your Honor's remark again. It is wholly uncalled for.

The Court: You may do all the objecting you want, but I am running this court and we are not going to have this interminable delay.

Mr. McGohey: May I—

Mr. Sacher: Excuse me a moment. I respectfully suggest, your Honor, that those recent remarks ought to be reconsidered. I really think—

The Court: They won't be reconsidered, and there is only one way that you are going to have things run smoothly and easily here, and that is that you gentlemen quietly and calmly do what I tell you to do.

Mr. Sacher: But I am afraid your Honor lost his calmness for once at this time—.

The Court: No. My patience it still working on. I make these statements in utter calm—

Mr. Sacher: It did not appear so to me.

The Court: —and they are in my judgment factually correct.

—Ch. Tr. 3291—

Mr. Gladstein: If your Honor please, I can't sit quietly while you include me in the statement that you just made that there was any intention on the part of any of the lawyers to make of the proceedings in this court a mockery of justice. I deny that there was any such intention, and moreover—

The Court: Well,—

Mr. Gladstein: May I finish—

The Court: —Mr. Gladstein, you know this is the fourth week of this trial. We have gotten in here now, in my judgment, a quantum of proof that could with diligence and with the intelligence and experience that you gentlemen have, been placed in the record in three or four days at the outside. I have said that I was thinking about doing something about it, and at the close of the session this morning I shall do something about it.

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—Ch. Tr. 3344—

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The Court: That may well be.

Now we are going to stop now, and we will have no session this afternoon.

I have indicated from time to time that I was going to try to think of some way of preventing this challenge from being an interminable procedure; and so I hereby direct that counsel for the defendants

have ready for me the first thing Monday morning a statement which shall show what they propose to

—Ch. Tr. 3345—

prove in the remainder of their case and how they propose to prove it, with considerable detail. I shall not require the names of witnesses. I shall require a perfectly plain, explicit and detailed statement of precisely what they propose to prove and how they propose to go about proving it.

When I get that statement on Monday morning we will continue with the testimony of Mr. Wilkerson, and I will examine the paper, pass on its sufficiency, and take such other steps as I deem advisable.

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—Ch. Tr. 3346—

New York, February 14, 1949
10.30 a. m.

The Court: Now, Mr. Sacher, have you got that statement ready for me?

Mr. Isserman: If the Court please, we have, * * *

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—Ch. Tr. 3349—

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(Statement submitted to the Court.)

The Court: I shall study that somewhat further later in the day.

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Wilkerson—Redirect
Colloquy

—Ch. Tr. 3379—

Q. Is it or not true that in those Congressional districts where the American Labor Party received a substantially higher vote, even as much as three times higher—

Mr. McGohey: I object to counsel testifying from the exhibit.

Mr. Gladstein: I have not finished.

The Court: Yes, please desist from that type of examination, Mr. Gladstein. All the figures are right on the paper there and I cannot fail to get the impression that when you continually repeat them the way you have done, some reason other than persuading the Court as to the evidence exists.

* * * * *

—Ch. Tr. 3398—

Q. Now the defendant Hall, his trade is stated here as lumberjack and steel worker. To which of the four categories does a lumberjack properly belong?

Mr. McGohey: I object to that, your Honor. There is no proof in the record as to what his occupation is.

The Court: Sustained.

Mr. Gladstein: I did not ask that. No. 1, the challenge sets forth in the moving papers what the trade is of each of these men.

The Court: That is no evidence, is it?

Mr. Gladstein: And I am asking—one moment, your Honor. Speaking of evidence, the United States Attorney referred to one of the documents in the case when he questioned on this general subject, and

I am asking this witness to indicate which of the four major groupings a particular type of work belongs.

The Court: You may do that hypothetically. You may say "assuming."

Mr. Gladstein: All right.

May I have the question read?

(Record read.)

A. On the premise that he had no supervisory functions above that of foreman he would belong to category 4, our

—Ch. Tr. 3399—

manual worker category, either as a lumberjack or steel worker.

Q. The defendant Foster, concerning him the challenge states—

Mr. McGohey: I object to any statement as to what the challenge contains.

The Court: You see, Mr. Gladstein, it is like all these other things; I indicate to you what to do and you look at me blandly and seem to acquiesce and then you proceed to do just the opposite. Now I told you you might put questions to the witness in hypothetical form.

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—Ch. Tr. 3415—

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The Court: Now that the testimony of this witness is concluded I find this memorandum dated February 14, 1949, that was delivered to the Court this

morning in response to my order of last Friday, is wholly insufficient; and therefore in the exercise of my discretion as to the order of proof, and without precluding counsel for the defendants as to what they may later do, I direct that at the close of the luncheon recess the Government proceed with its proof.

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—Ch. Tr. 3417—

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Mr. Isseman: If the Court please, the direction or ruling of the Court made at recess time to the effect that the defendants be at this time precluded from proceeding with their case and that the Government be allowed to proceed with its case at the commencement of this afternoon's session, we had then no opportunity to object because the same, as your Honor will recall, was made at the time of adjournment.

I herewith on behalf of my clients object to the Court's ruling on the ground that the ruling inter-

—Ch. Tr. 3418—

feres with the rights of the defendants to a complete and full presentation of the evidence on their behalf. While the ruling states that it is merely a ruling on the offer—order of proof it is for that reason in the Court's discretion. The defendants contend that this is an abuse of the Court's discretion in respect to order of proof and amounts to a lack of due process of law as guaranteed to the defendants by the Fifth Amendment to the United States Constitution.

Colloquy

Furthermore counsel were not apprised in what respect the memorandum which the Court has marked as its own exhibit just referred to was, and I believe I am quoting, wholly insufficient—unquote—and for what purpose it was used and in what respect it was insufficient for that purpose. And no opportunity was given to the defendants to present to the Court the reasons why the memorandum was sufficient and why they should be allowed to continue in the presentation of their proof.

Mr. Sacher: May it please the Court, I should like for the clients I represent to state our objections to this remarkable ruling of your Honor's. I say "remarkable" because we have just examined our first witness, and we had indicated to the Court in a detailed statement which we submitted this morning what we were going to prove in regard to the official

—Ch. Tr. 3419—

misconduct of those in this court who engineered, planned and administered this diabolical jury system whose characteristics—

The Court: Now, let us not have any more of this propaganda, Mr. Sacher.

Mr. Sacher: Well, all right, if your Honor think it is, I shall refrain.

The Court: You made extravagant charges; you iterated them and reiterated them, and I am not going to have any more of it. Now we have had four weeks of the so. . of thing that I have had occasion to speak of. I have made a finding here which is in my judgment amply sustained by the record, and I am just not going to have any more of it.

Mr. Sacher: If your Honor please, there would have been no occasion for me to speak at all on this

subject if, as we desire to do, we had been permitted to proceed expeditiously with the presentation of our proof. That was the course we were bent on. We were engaging in nothing which any impartial court would regard as improper conduct. We were submitting our evidence. We submitted this long statement to you which you required us to work on over the weekend, and, as Mr. Isserman pointed out, one of these days was the Sabbath; the other was a holiday;

—Ch. Tr. 3420—

but we had to work right through so as to submit this memorandum to you.

Now, I must in all candor say, your Honor, that it is very difficult for us among the defense counsel to believe that the United States Attorney was caught unawares in the request or the direction which the Court made to him to proceed with his proof on an hour and a half's notice—

The Court: Mr. Sacher, you are becoming positively insolent.

Mr. Sacher: Well, I am not. I am stating—

The Court: Now I won't have it.

Mr. Sacher: I am stating what your Honor seems—

The Court: You have charged me with about everything that a lawyer can charge a court—

Mr. Sacher: I am making no charge—

The Court: You are charging me by this innuendo of some sort of connivance with the United States Attorney, and I just will not have any more of that.

Mr. Sacher: Your Honor, I wish to renounce any such intention. I have no such intent. All I am saying to your Honor is that in the midst of the pre-

sentation of our proof, and without any prior notice from your Honor to either side—

—Ch. Tr. 3421—

The Court: You had plenty of warning.

Mr. Sacher: Your Honor, all I can say is that whatever warnings you have given certainly were not justified in dictating the course which you have dictated to us at this juncture. We are calling as we indicated in our memorandum to you today—we were going to call witnesses to establish on the basis of firsthand and personal knowledge the facts in regard to the character of the various areas from which jurors were selected as well as from those from which they were excluded; and among the items which we enumerated in the memorandum presented to your Honor was that which indicated that we would show through a clerk of this court, through judges and others that the jury system was of a character that we have complained of here.

Now, I respectfully submit, your Honor, that at such a pass in the adducement of evidence the interruption of our presentation of evidence and the direction to the Government to put its case in before we had rested and before your Honor has made any declaration as to his opinion as to the sufficiency or insufficiency of the evidence to establish a case, I respectfully submit that this is rather unprecedented procedure.

Now, the point we are making is fundamentally

—Ch. Tr. 3422—

this: we have prepared our order of proof. We were prepared, in deference to your Honor's request and ruling, to proceed with the utmost expedition, be-

cause there is one basic purpose that the defense has in this case, and that purpose is to establish its charges concerning the selection and administration of the jury system in this district. It does not serve the purpose of the defense to delay, obfuscate or obscure the quality, the weight and the significance of that testimony; and I therefore submit, your Honor, that in these circumstances and in the light of our undertaking to move speedily and directly in the presentation of proof, there is no real occasion for the direction your Honor has made. And in that connection let me observe, if your Honor had said on the basis of what we had laid before the Court that you would direct us to call certain witnesses first, then, whether we would like the ruling or not, we would be disposed to regard that ruling as falling more or less within the discretion which the Court has expressed itself as exercising in directing the order of proof. But I respectfully submit that what your Honor has directed deals not with the order. You have destroyed, if I may say so, all order of proof on our part. You have truncated it. You have,

—Ch. Tr. 3423—

for the nonce, taken from us the right to present evidence in support of the serious charges that are contained in this challenge; and in those circumstances I respectfully submit, your Honor, that in the proper exercise of discretion your Honor ought to permit the adducement of further proof relevant and material to the establishment of the challenge filed by these defendants; and in that connection I might say that we are prepared to defer to whatever ruling the Court may make in directing the order in which our proof should be adduced.

Colloquy

Now, it seems to me that in the light of the expression of such a willingness there should be no hesitancy, as I see it, on the part of the Court in permitting the further introduction of evidence. For, as I see it, it seems to me that certainly from here on out it cannot be said by anybody that the defense has not only been willing but eager to present its proof as speedily, as quickly as it can, and with due regard to whatever orders the Court may make as to the order of proof.

And in these circumstances I respectfully request of the Court that it reconsider its earlier direction and permit us to proceed with the adducement of our proof in support of the challenge.

The Court: After what has been going on here —Ch. Tr. 3424— for the last four weeks I think it would be a serious dereliction of duty on my part had I ruled otherwise.

Mr. Gladstein: Your Honor, I wish to object and to speak very briefly on behalf of my objection to the ruling which the Court has made terminating for the moment all right and opportunity of the defense to continue and complete the presentation of evidence in support of the challenge.

The charge that we make, as I need not remind the Court, is a very grave one, and would not and should not ever be made lightly. We did not make that charge lightly. We gave earnest thought to that charge, and gave vigorous effort to ascertain the evidence that exists that supports that charge. And when that charge was finally made and embodied in the papers that were sworn to and are on file here, that happened

only as a result of and after we had become convinced that given a fair opportunity to prove our contention, we would do so up to the hilt.

Now, we realize that the law places upon us the burden of proving those charges by a preponderance of the evidence. We gladly assume that burden. We willingly assume that burden; indeed, we demand the right to discharge to completion the burden we have

—Ch. Tr. 3425—

undertaken to discharge in the presentation of this case.

If the United States Attorney were concerned, as he might well have been, with the most serious implications of our charge; if, indeed, he had manifested any desire to be partners with us and with the Court in a true, impartial investigation of the facts rather than to proceed as though we were adversaries, as though we were trying a damage suit —if it had been different then there might be wisdom or justification for the suggestion on the part of the Court that Mr. McGohey proceed now—

The Court: It is no suggestion. It is no suggestion. I directed that that be done, and it will be done.

Mr. Gladstein: Yes. But I wish to say that everything that has happened in this case so far demonstrates that although this is the kind of charge which should inspire the Court to become an alert and eager participant in the search for the truth, so that the confidence of the people in their courts and in the administration of justice that occurs in their courts will not be shaken—although that should be the fact, it has turned out rather plainly, if the Court please, that we are engaged in a typical type of legal contest

in which you have one side pitted against the other

—Ch. Tr. 3426—

with the Court acting as a sort of referee. And if that be the case, as it is, we ask no favors, but we don't like the rules of the game changed in the middle.

In all such contests, he who starts out to prove, as he has a right to prove, a contention, is given the opportunity, because he has the right, to pursue his proof up to the point where the Court says—as your Honor did not say; I did not hear your Honor say: "Gentlemen, there is adequate proof in the record on the part of the defense. That will establish the validity of the challenge unless the Government comes in with proof that rebuts it." And if your Honor had said, "Mr. McGohey, at this point I have received enough evidence to warrant a finding that a prima facie case has been made out by the defense unless the United States Attorney rebuts that case, and hence I am calling on you, Mr. McGohey, to rebut that case, in view of my statement, in view of the finding I make that a prima facie case has been established"—if your Honor had said that then there might be some warrant for your Honor's ruling.

But since not only has your Honor failed to make a finding that way, that the defense have established a prima facie case in support of our challenge, but,

—Ch. Tr. 3427—

to the contrary, every statement, every implication, and even those things that emanate from the Court that do not appear reflected in the record—all combined to give the clear impression that your Honor is not of a mind to make such a finding at this time—then I submit it is not a matter of discretion of the

Colloquy

Court. The Court has no discretion at this point under the statement that it is simply ordering how the proof shall be brought in. The Court has no slightest discretion whatsoever to say at this point to us, absent such a finding that I have referred to, that we shall be cut off from introducing the balance of our proof and that Mr. McGohey shall go ahead.

—Ch. Tr. 3428—

The Court: That you shall what? And that Mr. McGohey shall go ahead? Let me hear that part.

(Record read.)

The Court: You are not cut off from introducing the balance of your proof at all.

Mr. Gladstein: At this point—

The Court: I am merely regulating the order of proof here. You are cut off from doing it now.

Mr. Gladstein: That is my point.

The Court: Continuing what you have been doing for the last four weeks, that you are cut off from.

Mr. Gladstein: That is exactly my point, that what your Honor has done is to prevent the proponent of this challenge from completing in the orderly manner in which due process of law contemplates that it shall be done the proof of our case.

And I desire to point out further for the record as grounds for my objection that we apprehend that Mr. McGohey will call to the witness stand as his witness one or more of the people whom we have subpoenaed as witnesses to appear and testify for the defense. And I know from my experience as a lawyer, and I am sure Mr. McGohey does, and I am

certain the Court is not unaware of this as a fact, that given a witness who is carefully led and directed in certain areas by Mr. McGohey the testimony may

—Ch. Tr. 3429—

be developed quite differently and with perhaps even different content than if that witness were put on the stand by us, though he be an adverse and hostile witness to us.

We are not satisfied that the law places upon us the burden of refraining from cross-examining a hostile witness but we take the law as it is, and if the law requires that we pursue in a certain manner our examination of an adversary witness we are content to accept the law and abide by it, but we insist upon our right to develop our case and present the evidence in support of our case as the law contemplates that it shall be done.

I therefore submit that when your Honor says that he is taking this step and ordering Mr. McGohey to proceed and by the same ruling ordering us to desist from putting in any further proof at this point, your Honor is not exercising any discretion as to the order of proof but is committing plain, clear reversible error.

Now I want to say that if your Honor does not reverse this ruling, as each witness is called by Mr. McGohey who—I do not know his witnesses—who, as it turns out may be one or more of those whom we had planned to call, I shall object to Mr. McGohey

—Ch. Tr. 3430—

proceeding with those or any of those witnesses as his. I state that now so that the Court shall be apprised of one of the reasons for my earnest submission of this argument.

Colloquy

Mr. Crockett: If the Court please, I should like to state on behalf of my clients our objections to the order entered by the Court immediately at the conclusion of the morning session. In my opinion the order amounts to an abuse of discretion on the part of your Honor, and I should like to point out in one particular respect in which I think there is an abuse of discretion.

We have made it plain from the outset that the whole theory of presentation of our proof had to do with showing the product of the illegal discrimination that we had alleged in our challenge. We proposed to show and we did show evidence indicating that there had been geographical, occupational and racial discrimination in the selection of jurors here in the Southern District of New York. It was further within our contemplation, once that pattern had been established, to call the clerk to the stand for the purpose of ascertaining from him how he could in compliance with the requirements of the law come up with an end product which indicated so much disparity between what the law required and what his methods had produced.

The Court is aware, I am sure, that the other day —Ch. Tr. 3431— at the suggestion of your Honor we obtained photostatic copies of certain records in the clerk's office. Those records indicated that the clerk was keeping separate lists of colored jurors. The memorandum which we filed with the Court this morning indicated very clearly the method by which we expected to prove the existence of discrimination because of race and color in the selection of jurors.

Colloquy

I cannot help but wonder, your Honor, whether or not it is an abuse of discretion on the part of the Court at this time that just as we are on the threshold of proceeding to present evidence of this illegal racial discrimination the Court enters an order to the effect that we shall cease right now and permit the Government to go on with its proof, which obviously will be an attempt to explain away the indices which we have already pointed out that indicate racial discrimination.

Mr. Gladstein: On this last, if I may just add a supplement to what Mr. Crockett has said: your Honor will recall that on the day when the clerk and some other representatives from the court attache's office came down here with certain lists of names of people who went into the jury system, that I identified for the record just one or two and then your Honor made an order that we could have some of those photostated—

—Ch. Tr. 3432—

The Court: Yes. You had huge stacks of documents there.

Mr. Gladstein: Yes, because huge stacks of documents were provided to the clerk by private, unauthorized organization such as the Federal Grand Jury Association, as we will show. Now, I did not create the huge stacks. That is the way it was. And, of course, when we ask for the records, if huge stacks come out it is because that is the way it was created in the office.

But your Honor will recall that when the recess occurred and I was in your Honor's chambers with Mr. Shapiro making notations as to some of those

records, there was one particular one that we were making notes of and it had the legend at the top "Colored List," and your Honor asked me what that meant, and I recall looking up to your Honor and saying, "That is the way in which the Negro people were segregated in the clerk's office by being put on a separate list."

Now, this I state merely in support—

The Court: That is what you said.

Mr. Gladstein: Well, we will see if the clerk denies that. But my point is that we have the right to examine him, his deputies, the jury commissioner, and as we said at the outset, one or more or perhaps all

—Ch. Tr. 3433—

of the judges of this court. This is not unusual. In matters of this kind, a challenge of this kind, it has been known that hundreds of witnesses have been produced.

The Court: The way this thing has been conducted, Mr. Gladstein, is something that I never thought I would see in a court of justice, never.

Mr. McCabe: I will agree, your Honor, on that last point; the way this case has been conducted is one which I certainly hoped that I would never see in a court of justice.

The Court: You mean the way it has been conducted by me, I take it.

Mr. McCabe: I mean that exactly.

The Court: I have in mind the way you lawyers for the defendants have acted and what you have done and what is already on the record, and with respect to which I made a finding, which I only made with the utmost reluctance and regret, as I stated at

the time. But that is all in the past; and what you did will remain and cannot be eradicated.

Mr. McCabe: I will say that so far as I am concerned and so far as I recall anything on the part of the attorneys for the defendants being concerned, there is nothing which we wish to have eradicated, but we will leave it to a higher court perhaps to eradi-

—Ch. Tr. 3434—

cate some of the errors to which I refer.

The Court: Well, that sort of threat does not have any effect upon me.

Mr. McCabe: It is not a threat at all.

The Court: I have been subjected to every kind of vituperation here and you might just as well tell me how I am going to be reversed and all that. It remains to be seen what will be done by higher courts, and your telling me about that isn't going to affect my judgment. I am trying my best here to rule justly, to rule impartially, to protect the rights of these defendants despite the conduct of their counsel, and I shall continue to do that.

Mr. McCabe: I rise simply to say—to except to your Honor's characterization that anything the defendants' attorneys have done is sabotage. Sabotage there has been, but as I say I think it has been a sabotage of the entire system of justice in this court, and I say that we are the only ones who seem to be interested in that.

Mr. Crockett: I should like to enter my objection to the Court's remark to the effect that your Honor had been engaged in protecting the rights of the defendants despite the conduct of their counsel.

The Court: And I shall continue to do that.

Colloquy

Mr. Gladstein: Well, now, may I ask your Honor this: does your Honor really mean that the record

—Ch. Tr. 3435—

shall indicate that it is a protection of the rights of these defendants for your Honor to say when I offer a piece of evidence, "Mr. Gladstein, that would be material, that would be relevant, that would help to prove your case, but I am not going to let you put it in evidence because I don't like the way you and your colleagues lawyers have been behaving"?

The Court: Did I say that?

Mr. Gladstein: In effect, yes, because you have absolutely rejected and you have prevented me from introducing evidence—

The Court: You approach the Court in this threatening way; I don't quite understand what you mean by it. But I do not desire any more repetition of your objections, and we will now go ahead.

Mr. Gladstein: When you say, approach the Court, your Honor, did you mean because I walked—

The Court: I mean, you walked right up near the bench pointing at me as though it was something horrible that I had done. I am not going to stand for that sort of thing, Mr. Gladstein.

Mr. Gladstein: I want the record to show that in the presence of several hundred people it was perfectly obvious that I was making no threatening or menacing gesture at your Honor. I was speaking to the Court.

—Ch. Tr. 3436—

The Court: You read what you said in the record and put it together with my comment and see whether my remark was justified or not.

Mr. Isserman: I would like to have the record note that at the point when Mr. Gladstein was talking to your Honor, which your Honor described as being near the bench, that he was alongside of the jury box.

The Court: Well—

Mr. Sacher: I would like to add that he was at a spot where he has been frequently in the last few days in the examination of the witness.

The Court: Very well, Mr. McGohey, you may proceed.

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—Ch. Tr. 3599—

New York, February 15, 1949

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Q. Suppose I came into your office and at the end of the filling out of my questionnaire you put the word "Deferred" opposite my name—

Mr. Gordon: Obviously Mr. Gladstein is not qualified for jury service—

Mr. Gladstein: Not a resident, but I will be soon.

Mr. Gordon: And also you purport to be a practicing attorney.

Mr. Gladstein: I withdraw that. I didn't think that Mr. Gordon would get so technical.

The Court: Well, it is a good point, isn't it?

Mr. Gladstein: Do you think so, Judge?

The Court: Well, it doesn't seem to me that it is a

bad one. The witness might naturally misunderstand. It is easy to put a hypothetical case without making it personal.

Mr. Gladstein: Well, even if I am a lawyer, not a resident, they could have done a lot better with people like me in the jury system than what they did. However—

Mr. McGohey: I move to strike it out, and I am not sure that it is so.

—Ch. Tr. 3600—

The Court: Mr. Gladstein, I noticed a tendency on the part of a number of counsel to make those comments, obviously for the benefit of those present in the courtroom, and, frankly, I don't like them. I hope you will try to desist.

Mr. Gladstein: I will restrain myself.

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New York, February 16, 1949

—Ch. Tr. 3674—

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Mr. Gordon: Wouldn't it save time if he asked the witness what is shown on the exhibit?

Mr. Gladstein: Just a second. That is all right with me, except every time I ask the witness to testify as to what is shown on the exhibit before it is in evidence, then there is an objection. Then when it is introduced in evidence and I ask the witness to testify about that, then there is an objection.

Mr. Gordon: I withdraw the suggestion. Go ahead.

McKenzie—Cross
Colloquy

—Ch. Tr. 3675—

The Court: Mr. Gladstein, I hope I am misunderstanding the purpose of that comment. It does not seem to me that you needed to do it. It seemed to have just one of those little fishhooks in that you so often sprinkle in your conversation, and I suggest that you omit them, if possible.

Now, you have been allowed every reasonable latitude here, and it is my intention to give you every reasonable latitude to bring out whatever you want to bring out—

Mr. Gladstein: Very well.

The Court: (Continuing) But I cannot continue to do it indefinitely, and if I get the impression that sarcastic comments and criticisms of the Court by innuendoes are being dropped in here and there, it is perhaps going to affect my discretion somewhat in the rulings I make on the extent of your cross-examination.

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New York, February 17, 1949

—Ch. Tr. 3869—

Q. Did you send out notices to Putnam County because you needed additional jurors? A. We are always sending out notices—

Q. Did you, yes or no, for that reason?

Mr. Gordon: Let him answer that.

Mr. Sacher: It is the second try at it. I think I am entitled to an answer.

The Court: Do you think it is important, Mr. Sacher?

Mr. Sacher: Yes. I have another question to follow up with.

Mr. Gordon: The witness started to say, "We are always sending out notices," when Mr. Sacher interrupted him.

The Court: I know.

Mr. Sacher: What is your Honor's ruling on it?

The Court: Isn't it clear that they always desired to get additional jurors? What else could be the point of sending the notices out?

Mr. Sacher: Why can't he answer it then, like an honest man would?

The Witness: We started to send—

The Court: He is wondering that there might be something about it that does not meet the naked eye.

Mr. Sacher: There probably is, but that is no

—Ch. Tr. 3870—

business of his.

The Court: Well, maybe so, but you ask why he is hesitating. I have a little experience. I am watching and listening here, and I do not think it impairs a person's credibility when he begins to think a little bit before answering the question, particularly one that seems so obvious as that one; he wonders whether or not there isn't something the matter with it.

Mr. McGohey: Official [a fishhook?], perhaps.

The Court: So let us take it that he said that he was trying to get more jurors. Now, go on with that next question that is going to be so good.

Mr. Sacher: Your Honor's sarcasm apparently reached the reporter of the World-Telegram. I recognize his raspy gurgle there.

Mr. Gordon: May that be stricken out, your Honor? I object to further examination of this kind by counsel, and if that is as much as the cross-examination is going to consist of, I would like to go back to redirect.

Mr. Sacher: No, that isn't all.

The Court: I sustain the objection.

By Mr. Sacher:

Q. Had you sent any notices to Putnam County prior to the month of May 1947, as appears from page 4 of Exhibit 179? A. Had we sent any notices?

—Ch. Tr. 3871—

Q. Yes. Did you before May 1947 ever send any notices whatever to Putnam County? A. Back in 1940 the Directory of Directors had names from all those outlying counties.

Q. I didn't ask you that. I asked—

Mr. Gordon: I submit that he has answered that.

The Court: Yes, I think he has answered it. Ask another question. I am getting the impression now that just because this reference to Putnam County is here that you decided to play around with it for an hour or so—

Mr. Sacher: No.

The Court: —and use up time. I am not going to have it.

Mr. Sacher: Let me put the question.

I want to except, by the way, to being ordered to move from question to question. I want to explore this briefly, not for a length of time.

The Court: If you think these cracks about the voice of a reporter that you seem to recognize are helping you here, you are making a big mistake. I consider that sort of thing frivolous and diverting and entirely inconsistent with the dignity of the court, and I am having a great difficulty in putting a stop to it. And I don't know how it is, but you are perfectly incorrigible. You have such a sense of your

—Ch. Tr. 3872—

own importance and your own conceit that nothing will put you down.

Mr. Sacher: I think that is absolutely unwarranted.

The Court: Well, it may seem so to you, but I am going to put a stop to that sort of thing—wise-cracks, flippant remarks, that sort of business all day long, I won't have it. It may seem funny to you, but I do not consider this a place for that sort of thing.

* * * * *

—Ch. Tr. 3921—

Mr. Crockett: If the Court please, I believe the record already shows that all of the history cards in the active file are present here in court. I would like

to request, with the Court's permission, that the history cards for each person who is named on Exhibits 159, 160, 162, 163 and 226 be deemed marked in evidence. Those numbers that I refer to are the so-called "Colored" list.

Mr. Gordon: That is objected to, your Honor, unless there is some point to it. It is just time-consuming.

—Ch. Tr. 3922—

The Court: You see, those are the five lists of colored names, that is, names of colored persons, and my disposition is to allow complete evidence as to all of those on those lists to find out whatever may be found. Now, I do not want to just deem them in evidence without my looking at them, because I have been looking at everything here as it goes along.

Mr. Crockett: May I suggest that Mr. McKenzie's assistant can be picking them out while we go on with this cross-examination.

The Court: Yes, but when do you think I am going to be looking at them?

Mr. Crockett: No; I mean as soon as he gets them together then we can pass them up to your Honor or we can take it up in the morning.

The Court: Well, I think we will start with two of them and see what we find, and then if there is some reason to go beyond that I will permit it to be done.

—Ch. Tr. 3923—

Mr. Crockett: I can explain to the Court that what I am trying to find out is how many of those on that

list became jurors, actually qualified for jury service; secondly, which ones qualified as grand jurors and which ones qualified as petit jurors. I think that information is obtained from the history cards.

The Court: Suppose, while we are discussing it, suppose we found that it was in any proportion you choose to assume, what inferences might one derive from that?

Mr. Crockett: I am not concerned about the pro-

—Ch. Tr. 3924—

portions, your Honor. I want to find out whether or not any of them qualified for the grand jury from that list.

Mr. Gordon: Your Honor, I object to that as completely irrelevant to anything that could possibly be raised.

The Court: Well, it is beginning to give me the impression that I had last week of an endless chain; whatever you find then that is always the springboard for something else that may be found, and you go on and on and there is never any end, and I very much dislike curtailing proof when you get into the actual workings here. I want to give every reasonable opportunity to show anything that is wrong there. But it looks to me as though it was just a fishing around in the hopes that something or other might be found that would lead to something else.

But, anyway, I am going to let the cards on those two lists be got out, and then I will take a look at them and we will see.

McKenzie—Cross
Colloquy

The witness, Mr. Sacher, has now got that memorandum here, and I take it you would prefer to wait until Mr.—

Mr. Sacher: May I see the memo, however, in the meantime?

—Ch. Tr. 3925—

The Court: Yes, you may.

Mr. Gordon: May I call something to your Honor's attention?

The Court: Yes.

Mr. Gordon: Right at the beginning of the cross-examination of the witness by Mr. Crockett he called for the qualification sheet and the card of Richard—

The Court: S. Bair.

Mr. Gordon: —Bair, which was marked Exhibit 184-A and B.

The Court: That is right.

Mr. Gordon: And that is one of these sheets that has a C on it, and the history card shows that the man is a grand juror and that he served in 1944 and 1947 on the grand jury.

The Court: Oh. Well, then I will take back that other direction.

You knew all the time there was one that was a grand juror.

Mr. Crockett: No, I did not. And I would like to see that questionnaire.

The Court: Well, take a look at it.

Mr. Crockett: But my point is to find out how many people on these other exhibits qualified as grand jurors.

McKenzie—Cross
Colloquy

—Ch. Tr. 3926—

The Court: I am afraid it is some more of this trifling.

Now, you need not take any of those cards out, you just leave them alone for the time being.

Let Mr. Saeher see that memorandum.

* * * * *

—Ch. Tr. 3945—

Q. Who are the people during 1947 and 1948 who have been making the markings in these lists of registered

—Ch. Tr. 3946—

voters? A. A Mr. Ward, deputy court clerk.

Q. First name, please? A. Thomas Ward; a deputy court clerk.

Q. Who else? A. A Mr. Rexrode.

Q. Full name, please? A. Charles Rexrode.

Q. Yes? A. Mrs. Florence Fitton.

Q. Is she a relative of yours by the way? A. Of mine?

Q. Yes. A. No, sir.

Q. Is she related to the clerk?

The Court: Suppose she were, what of it?

Q. Is she related to the clerk? A. She is not related to me.

The Court: I am not going to permit that. I don't understand that kind of thing. Suppose she were his sister, what of it?

Q. Who else, please, Mr. McKenzie? A. Mrs. Stevenson.

Q. Who else?

Mr. Crockett: First name?

Mr. Gladstein: Do you want to give the first name of Mrs. Stevenson?

The Witness: That I don't know, the first name of Mrs. Stevenson.

Q. You don't know? A. No. I believe there was Mr. Leary.

Q. First name.

—Ch. Tr. 3947—

Mr. McGohey: Your Honor, what is the materiality of this?

The Court: Well, I am going to find out. Maybe they want to subpoena all these people.

Mr. Gladstein: I might. It is possible that the recollection of one of them might be better on the subject than Mr. McKenzie.

Mr. Gordon: Your Honor, unless there is some further cross-examination which is proper or relevant, I am going to object to this and ask that we go on with the proof. That remark certainly was uncalled for.

The Court: Yes, it does seem to me of getting back to that old routine of just dragging, dragging, dragging; and if you are just going to ask the witness about all the different people around the court house—

Mr. McGohey: And his relatives.

The Court: —and then plan to serve subpoenas on everybody to keep the thing going indefinitely, I will find some way to stop it.

Mr. Isserman: Now, if the Court please, I am going to object to your Honor's characterization of the cross-examination—

The Court: Yes, you are always helpful, Mr. Isserman. Go ahead.

Mr. Isserman: I would like to object to your

—Ch. Tr. 3948—

Honor's remarks on the ground that the inquiry from a witness on the persons under him who did things in connection with jury service is completely relevant and proper. There is no indication or suggestion that every one of those persons is or will be subpoenaed, but on cross-examination we are entitled to know the persons who worked on the selection which is on review before the Court. We are entitled to pursue this cross-examination, and on behalf of the clients I represent, while we have made every effort here not to duplicate, and it is not our intention to duplicate, I say that I desire and expect to have the right to cross-examine this witness to the point where the essential matters which I believe—

The Court: You are going to cross-examine him too?

Mr. Isserman: I certainly am, your Honor, on behalf of my clients.

The Court: Well, we will see.

Mr. Isserman: We will see about that. I have

matters which have not been touched on by the others.

The Court: Better let Mr. Gladstein take care of it at the moment, and then when you start cross-examining you will have enough to do then.

Now, go ahead, Mr. Gladstein, with the rest of

—Ch. Tr. 3949—

those books and get the business here.

* * * * * *

—Ch. Tr. 4098—

New York, February 18, 1949

Mr. Sacher: May it please the Court, I wish to interpose objection to your Honor's limitation of cross-examination on one very specific ground and on a number of general ones:

The specific ground deals with the memorandum which your Honor ordered the witness, Mr. McKenzie, not to produce yesterday until such time as your Honor—

The Court: That is right, and he had it here after the recess of 3.30 and you had it in your hand for about an hour or so.

Mr. Sacher: Yes. And I would like to point out to your Honor that it was handed to me at the time that Mr. Gladstein was engaged in cross-examining the witness; that Mr. Gladstein had not completed

—Ch. Tr. 4099—

his cross-examination yesterday; that he did not complete it until this morning; that I, out of deference

to the Court's ruling and its insistence upon observance of the procedure which it had outlined—

The Court: I never insisted that you should go in any order. In fact, I have let you lawyers take such order as you chose between yourselves, and I felt I would have a lot less trouble if I did that. Rather than trying to have you go in some order, which would only make for confusion and disturbance, and be bad for you, I thought it was much better to leave you alone, which I had done.

Mr. Sacher: I thought it was better to leave your Honor alone for a little while today in the hope that after the examination in main had been completed by counsel—who, by the way, each act independently on behalf of thier own clients—

The Court: I know your view is that there has been no concerted action, but I have found on the contrary that there has been concerted action, wilful and deliberate concerted action for delay, and I have found plenty more of it this week.

Mr. Sacher: Your Honor, I ask for the opportunity to address objections—

The Court: I know.

—Ch. Tr. 4100—

Mr. Sacher: —and I did not extend an invitation to have those objections interrupted—

The Court: Well, you see, I don't have to wait for an invitation.

Mr. Sacher: I realize that, your Honor. In that respect you have something of an advantage over me.

The Court: Yes.

McKenzie—
Colloquy

Mr. Sacher: But I would like to make this observation, that the fact does remain, no matter what may or may not be said, that I was denied the opportunity to examine Mr. McKenzie concerning a most material item, namely, the item as to when he sent this gentleman, Mr. Rexrode, to the Public Library to examine Poor's Directory of Directors.

The Court: That vital fact.

Mr. Sacher: Well, I will tell your Honor something: I will ask you for the opportunity at least to place that exhibit into the record so that you or the courts above may see how vital it might have been.

The Court: Let us not bear about the courts above.

Mr. Sacher: I withdraw that.

The Court: You have such a nice way of telling me what the courts above are going to do. Now let us worry about what we are going to do, and let

—Ch. Tr. 4101—

the courts above—

Mr. Sacher: I don't think there is any need to worry about it. Your Honor has given indication from the first day we got here as to what the courts below will do; and so we are like those poor people, the meek, who if we can't get anything on earth, hope for something in heaven, you see, up above.

. . . . . .

—Ch. Tr. 4107—

. . . . . .

Mr. Crockett: If the Court please, I desire to object on behalf of my clients to the ruling made by

the Court curtailing our right to further cross-examination of the witness. I submit that that ruling amounts to a denial of due process of law to my clients under the Fifth as well as the Sixth Amendment, in that it denies to my clients and to myself the opportunity to effectively represent them, an opportunity to which all defendants in a criminal trial are entitled to under the United States Constitution.

I also wish to object to the ruling made by the Court near the close of the session yesterday upon the occasion when I requested permission to examine certain history cards with reference to names which appear on certain lists submitted to the jury clerk and already offered in evidence. I think that was a most arbitrary—

The Court: You mean that I refused to let you look at papers that were in evidence?

Mr. Crockett: I mean precisely that—not the

—Ch. Tr. 4108—

papers that were in evidence, but the cards which related to those papers that were in evidence.

The Court: Oh, that is different.

Mr. Crockett: —when those cards were present right here in the courtroom not more than five feet away from the witness stand, and when I might very well have walked over there and examined those cards without in any way interfering with the conduct of the trial.

The Court: Well, you probably remember what was discovered in the colloquy about that. You made a representation to the Court which turned out not to be the fact.

McKenzie—
Colloquy

Mr. Crockett: I deny the Court's statement that I made a representation to the Court which turned out not to be the fact.

The Court: You said that you had to get those cards to see whether any one of those persons had ever been on the grand jury, thus giving me the impression that you did not know that any of them were on; and Mr. Gordon walked over and picked out some of the papers already in evidence on which were one of these very persons, and there was the blue card showing that he was a grand juror or had been, and you must have known it. So, naturally, I took that into consideration.

. . . . . .

—Ch. Tr. 4116—

Mr. McCabe: I would like to say to your Honor that I really have come to believe that the constant repetition by your Honor at intervals which are almost as regular as the tolling of Big Ben—and I mean nothing personal in the allusion—or the eruption of Old Faithful out in Yellowstone Park, or wherever it is—these come at stated periods. I think you can pick 11.20 and 3.20 when these statements come that we are delaying; we are doing nothing; your Honor has seen nothing in the record. I say, I don't want—

The Court: What is the point of those times, of those particular times?

Mr. McCabe: 11.30 I think is the deadline for the afternoon papers, your Honor, and I think around 3.20 is the deadline—

—Ch. Tr. 4117—

The Court: Well, that is something I had no idea of, and I must say you have got an ingenius mind to suppose that something was said for such a purpose. I think you ought to be ashamed of yourself.

Mr. McCabe: Your Honor, I would like to make one closing remark: that is that I think what your Honor has overlooked here has been the fact that 11 men are under indictment, which we are attacking, and which involves penalties of ten years in jail. I think that when the defense in that case as a preliminary move makes an attack on the very system of the selection of the grand jurors which indicted those men, I think that that attack should not be frustrated by mere desires to conserve time; nor do I think that that is the reason.

Whatever pride I have in the last couple of hundred years of this country is wrapped up in the law; whatever pride I have in the last 26 years is wrapped up in a devotion and an affection for the law. Whatever pride I have for the next few years is wrapped up in that. And for years I have been talking to clients and telling them that this law of ours, its institutions, is a pretty sacred thing and not to be tampered with. I have had the occasion—

The Court: And if the judge disagrees with you he is prejudiced.

—Ch. Tr. 4117a—

Mr. McCabe: —I have had occasion to represent many persons who have chosen paths outside the law, and in pointing to them the error of their ways, I

had occasion on many a time to assure them that they were going to get a fair trial. I am thoroughly devoted to that, your Honor. But it goes beyond this case—

—Ch. Tr. 4118—

The Court: Of course, you abandoned all thought of that, you and your colleagues, long ago here because you charged me again and again with corruption, bias, prejudice and having something to do with the system that I had nothing to do with. So I understand thoroughly what you think about me. Now, I can't help that. I must do my duty as best I can. So if you want to go on and call me some more names, go ahead and do it. It may come within part of your duty as you see it, and certainly it would be relevant to the case, and I am not going to stop you, so go right ahead and call me anything you want.

Mr. McCabe: I have not abandoned all hope, your Honor. Locus poenitentiae is a part of my whole being.

Mr. Gladstein: Your Honor has asked each of the defense attorneys to state—

The Court: No, I have given you an opportunity if you desire to object and protest. I thought from prior experience that you probably would each desire to do so.

Mr. Gladstein: (Continuing) each of the attorneys to state such grounds as he has to object to the ruling that terminates the cross-examination.

McKenzie—
Colloquy

of Mr. McKenzie. The Court also granted me leave
—Ch. Tr. 4119—
upon my request this morning, to address myself to the ruling of the Court by which I was denied the opportunity to have produced here certain documents which were within the possession or custody of the witness McKenzie.

That the Court is not concerned with the consumption of time is evident from the fact that during the past 35 or 40 or 45 minutes, perhaps longer, as each of the four attorneys who preceded me attempted to present his statement of objections, the Court constantly and frequently interrupted for the purpose of—

The Court: If you expect I am going to sit here like a bump on a log while they make statements that are absolutely not so, I can tell you now I won't do it.

Mr. Gladstein: I desire—

The Court: There is no rule I ever heard of that a judge is supposed to sit silent while the attorneys flay him.

Mr. Gladstein: I desire to make an orderly, logical presentation of what I have to say,—

The Court: Go ahead and do it.

Mr. Gladstein: (Continuing) —in opposition to the Court's ruling, two rulings; one which terminates the cross-examination, the other which prohibits or prevents us from having access to the documents that I called for.

McKenzie—
Colloquy

—Ch. Tr. 4120—

The Court has said that there has been no proof of discrimination. I do not wish to argue any point at this time, but for the purpose of understanding the basis of my objection it is necessary for me to point out that Mr. McKenzie has admitted here that for an entire period of two years all through 1947, all through 1948, while he had in his possession the registered voters lists for every Assembly District in Manhattan and in the Bronx, and while he used liberally certain of these Assembly District lists, particularly those which are located or which refer to areas within the Silk Stocking District, within the 17th Congressional District, he consistently and persistently did not use any single one of the four registered lists dealing with the 11th, 12th, 13th and 14th Assembly Districts in Manhattan, of which the Court took judicial notice—

The Court: Are you addressing yourself to my ruling in cutting off the cross-examination?

Mr. Gladstein: I am. (Continuing) of which the Court took judicial notice that these four districts are represented by Negro Assemblymen in the State Legislature.

Also, the clerk admits that during that entire period of two years, although there was available to him the registered voters lists for the Fourth and

—Ch. Tr. 4121—

Sixth Assembly Districts of Manhattan, those are the two in the Lower East Side where the poor Jews reside, not one name was used from either of those two registered lists.

McKenzie—
Colloquy

The Court must also be aware of the fact that Mr. McKenzie has testified that from 1945 to 1947, which brings it back another two years, he used the registered lists for one Assembly District in Manhattan and he is unable to identify it, one only, and one for the Bronx, that one being the one that embraces the Parkchester housing development.

So we have a period of four years' continuous, systematic pattern established by the testimony of the Government's witness.

We also know from Mr. McKenzie that from 1943, when he came back from the Army, to 1945, he sent out no notices of any knid that are here reported because he had certain ones accumulated; and we know that from 1940 to 1942, based on his own testimony, he used lists and sources from which he got his names of jurors, lists provided by the Federal Grand Jurors Association, lists in which they had the temerity to state whether you were black or white. We also know that—

The Court: I never could see what was wrong with that. That to me is the most extraordinary

—Ch. Tr. 4122—

contention. According to the testimony of Mr. McKenzie, Mr. Follmer, the clerk, told him that somebody had wanted to find out how many Negroes were on the jury cards and that he was told, as they had no way to indicate it up to that time, to make some indication on these questionnaires, which he did; and he did it from that time on. Now, I think there must be something wrong with my thinking apparatus if merely putting those C's on there for

that purpose is an illegal act that makes a whole jury system open to such an attack.

Mr. Gladstein: And we also—

Mr. Crockett: Your Honor, the very fact that you can't see anything wrong with that is why at the outset of this case we asked that you be disqualified from presiding.

The Court: You see, it is what I said before, that if the Judge disagrees with you, then he ought to be disqualified, so that you always win. It is the funniest thing I ever heard of.

Mr. Gladstein: And we also know, if the Court please, that during this period of time from 1940 through 1948, although at no time was any effort made by the clerk to obtain members of trade unions to serve on juries, hundreds upon hundreds of names were obtained from the directory that contains the names of the corporation directors of this commu-

—Ch. Tr. 4123—

nity so that they could be brought into the grand juries and petit jury service. Now, these facts were obtained from an adverse witness, from a witness who was produced by the Government. Your Honor knows that on cross-examination—

Mr. Gordon: I wonder if Mr. Gladstein could stay off my neck. I don't wish to be associated with him in any way.

The Court: Go ahead, Mr. Gladstein. Don't be getting right in the back of Mr. Gordon's neck. He finds it bothers him.

Mr. Gladstein: Your Honor knows that when a jury clerk takes the witness stand in a matter of

this kind he is recognized in law as an interested witness. It is recognized by the law, very sensibly, that he is understood to feel that he is on the defensive and that he intends when he takes that witness stand to defend his conduct and, if necessary, to do so by concealment or by failing to tell all the truth, or by being misleading, for example, as he has been even by the concession of your Honor with respect to the filing of one affidavit, and so—

The Court: Now, I cannot remain silent when you say those things. I never made any such concession, and it is the way you lawyers were doing earlier.

—Ch. Tr. 4124—

Every time Mr. McGohey or Mr. Gordon said anything you jump up and say he conceded something. All I said was that that statement was not false, that the most that could be argued was that it was misleading.

Mr. Gladstein: Just what I said.

The Court: And you say therefore I concede that it is misleading. Now, I don't know why you keep doing that, but however that may be, when you do it don't expect that I am just going to sit here. Sometimes I can sit quietly and listen to these fulminations and say nothing, but once in a while I just can't sit quiet.

—Ch. Tr. 4286—

New York, February 25, 1949

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The Court: Now, gentlemen, I have formulated in my mind ways to bring this challenge to a close, and from now on I will hear no argument on motions or on objections to evidence except where I indicate my desire to have argument, and I will announce further things that I have considered a liftle bit later on.

* * * * *

—Ch. Tr. 4397—

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Mr. Isserman: I want to state my objection, if the Court please, to the termination of cross-examination.

The Court: You state your objection but not with the long statements such as you made the other day about all the things you were going to prove if you had an unlimited time to go on with cross-examination. You may object to the limitation upon the cross-examination. It will be assumed that all the proper grounds are stated and that you insist that if you had a longer time you would bring out a lot of material facts, and I am going to overrule the objection, and you have an exception.

Mr. Isserman: And I want to state one objection which your Honor hasn't suggested.

The Court: All right.

Borman—
Colloquy

Mr. Isserman: And that is an unwarranted interference with cross-examination and with the right of my clients to cross-examine this witness who has been hostile and evasive from the first moment he got on the stand.

The Court: Well, it is for me to decide whether he has been hostile and evasive.

Mr. Isserman: And I would like to add that the action of the Court in curtailing cross-examination at this time is a violation of due process and a viola-

—Ch. Tr. 4398—

tion of the constitutional rights of our clients and prevents us from putting on this record the facts which this witness has and has been concealing in his examination.

The Court: Let me have the letters—the ones that you asked for and did nothing with him.

Mr. Isserman: I did nothing because your Honor curtailed the examination.

The Court: I want them. Give them to me.

(Handed to the Court.)

Mr. Gladstein: I desire the record to show the tone of voice in which the Court demanded them—

The Court: Yes, you can put all the tone of voice you want in.

Mr. Gladstein: May I finish?

The Court: Because we are pretty near the end of this challenge.

Mr. Gladstein: Your Honor, I would like to finish my statement for the record. I wish the record to

show my objection to the tone and the manner in which the Court delivered that command as unbecoming a Court, and I object to it. I also—

The Court: There is nothing unbecoming about it. I am through being fooled in this case.

Mr. Gladstein: Now, if your Honor please—

The Court: If you don't like it you can lump it. Put

—Ch. Tr. 4399—

that down.

Mr. Isserman: I object to your Honor's remark and characterization of the conduct of counsel, and I ask that your Honor strike that remark.

The Court: Oh yes, yes, I have heard all that. Now I am sick of it.

Mr. Gladstein: Now I wish to add to my objection the unseemly remark of the Court saying that if we do not like it we could lump it. I object to it and ask the Court to withdraw and strike that statement from the record.

The Court: Yes, I refuse—I deny the motion.

Mr. Gladstein: Now I wish to take one moment to add my objection to the record, which is this, with respect to curtailing and terminating the cross-examination of Mr. Borman, that I was compelled to end my cross-examination because of the order of the Court without having completed several fields of inquiry into which I was prepared to go—

The Court: Now I don't desire further argument, Mr. Gladstein.

Mr. Gladstein: I wish to state this for the record—

The Court: I will tell you now to desist.

Mr. Sacher: May I, however, just interpose my

—Ch. Tr. 4400—

objection to having—to my cross-examination having died aborning, your Honor?

The Court: It was indicated to me this morning that the only additional counsel who desired to cross-examine was Mr. Isserman. I stated then that whoever was to cross-examine among you all would have to finish by three o'clock. Now that is my ruling and you each severally have an exception to it. Now I do not want any more.

Mr. Crockett: May I state my objection, because of the nature of the Court's ruling this morning I feel—

The Court: Do you feel it is necessary for you to add something?

Mr. Crockett: I do.

The Court: Please desist. I tell you not to.

Mr. Crockett: Well, may I take an exception to the Court's remark this morning?

The Court: You may.

Mr. Crockett: That "people of your kind," which was addressed to my colleague here, Mr. Gladstein, to me it infers something in the nature of either racial or religious bias. I would like—

The Court: Racial or religious bias?

Mr. Crockett: I mean exactly that. The Court's remark to Mr. Gladstein, "people of your kind,"

—Ch. Tr. 4401—

such and such a thing. That is a general—

The Court: I observed the conduct that you gentlemen have put on here, the sort of delaying tactics and other things that I have noted in the record

before. I had no reference to any religious or other matter of that kind, and you must know it perfectly well.

Mr. Crockett: I do not know it—

The Court: Now please sit down.

Mr. Crockett: And for that reason—

The Court: I am not going to have this jumping up.

Mr. Crockett: I would like to put my objection on the record.

The Court: Well, you have your objection on the record; you have the race discrimination in, you have everything else in. Now please sit down because I desire to put a question or two to this witness.

Now, Mr. Borman, is this the correspondence with the pastors of the various churches that you referred to in your testimony?

Mr. Isserman: I object to your Honor's question on the ground that the Court has taken over cross-examination and has not allowed me to cross-examine this witness on the letters which the Court has now handed to him.

The Court: Your objection is noted.

—Ch. Tr. 4402—

The Witness: Yes, your Honor.

Mr. Gladstein: May we have a ruling instead of just a notation, your Honor? An objection should be sustained or overruled.

The Court: Yes. It is nice of you to tell me what to do. The record will stand just as it is.

Mr. Gladstein: I ask the Court to rule whether the objection is sustained.

The Court: Yes, I know, I heard you.

Now what is the answer?

The Witness: Yes, sir.

Mr. Gladstein: I object to your Honor's failure to make the ruling.

The Court: Your objection is noted.

The Witness: Yes, your Honor. Those were the six letters.

The Court: And what is that other letter there?

The Witness: This was the one answer that we received.

Mr. Isserman: I have the same objection to every question which the Court is putting in connection with the letters.

The Court: Yes. It is a new doctrine that the Court isn't supposed to have the power to ask any questions of the witness.

—Ch. Tr. 4403—

Mr. Isserman: Not on matters on which the Court has cut off the cross examination, which came up during the cross.

The Court: This will undoubtedly help you.

Mr. Crockett: May I ask that the documents be marked at least for identification?

The Court: I am going to put them in evidence right now as Court's Exhibits.

Mr. Isserman: I object to that.

The Court: Why certainly, you object to everything.

Mr. Isserman: I object to your Honor's remark in that respect.

The Court: Well, that is fine. Go ahead.

St. Clair—Direct
Colloquy

Mr. Isserman: Now I ask for the right to cross-examine on the exhibits which this Court has put into evidence.

The Court: Motion denied.

Mr. Gladstein: Now I ask for the right to question on the documents which the Court has put into evidence—

The Court: Motion denied.

Mr. Gladstein: May I finish? —for the reason that the documents contain statements and those are statements which show the involvement of Judge Knox in this matter, and also the letters happen to

—Ch. Tr. 4404—

be signed not by this witness but by the clerk, and I desire to examine as to this witness's knowledge of and connection with the letters, the manner in which it was determined and the circumstances under which it was determined to send such letters.

The Court: All right, I will give you ten minutes to do it.

Hand him the letters.

* * * * * *

—Ch. Tr. 4498—

New York, February 28, 1949

* * * * *

Mr. Gladstein: I have a few questions to ask of the witness.

By Mr. Gladstein:

Q. Mrs. St. Clair, did you ever obtain information from the clerk of this court during the years you were submitting the lists of names as to the percentage of those names who were found qualified and who became jurors?

Mr. Gordon: Objection.

(Question read.)

The Court: Sustained.

Q. Did you ever check with the clerk to ascertain from one year to another the extent to which the names you were submitting of people actually went into the jury system?

Mr. Gordon: Objection.

—Ch. Tr. 4490—

The Court: Sustained.

Q. Do you have any indication from the clerk or anybody connected with the clerk to indicate the extent to which the names that your Association submitted on these lists that have been put in evidence here today, actually became people in the jury system, grand or petit?

Mr. Gordon: Same objection.

The Court: Sustained.

Q. Can you deny—

Mr. Gordon: I object to that.

The Court: You know this is direct examination

and you have had a good deal of experience and know how to put questions.

Mr. Gladstein: I withdraw it.

Q. Is it a fact, Mrs. St. Clair, that a majority, to your knowledge, of the people who became grand and petit jurors in this court came from the lists that your Association submitted?

Mr. Gordon: Your Honor, I cannot characterize the conduct of counsel.

The Court: You object?

Mr. Gordon: I do object.

The Court: I sustain the objection.

Mr. Gordon: It is obviously for propaganda purposes.

—Ch. Tr. 4500—

Q. Mrs. St. Clair, did you ever get word from Mr. Tanner or Mr. McKenzie or Mr. Borman, Mr. Follmer or any of the officials of this court advising you that they were satisfied with the type of people whose names were on the lists that your Association submitted?

Mr. Gordon: Same objection.

The Court: Sustained.

Mr. Gordon: And I object to further questions along this line, on the ground they are leading in the direct examination of counsel's own witness.

Q. Whose idea was it, Mrs. St. Clair—

The Court: I will make no direction because of this limitation of time.

St. Clair—Direct
Colloquy

Q. Whose idea was it to have the Association, your Association, prepare and procure these names and prepare lists and submit them to the clerk of this court?

Mr. Gordon: I object.
The Court: Sustained.

Q. Do you know, Mrs. St. Clair, who proposed, during any period of time when you were connected with the Association and had the relations you have already described with the clerk's office of this court, do you know at whose suggestion the idea was developed of your Association preparing these lists such as have been introduced in evidence —Ch. Tr. 4501— here today?

Mr. Gordon: I object as irrelevant.
The Court: Sustained.

Q. Whose idea was it, Mrs. St. Clair,—

The Court: You are proceeding as though you were cross-examining. This is your witness.

Mr. Gladstein: It is not my witness. I did not call this witness.

The Court: Oh, do you claim you are entitled to cross-examine as though a witess called by the prosecution?

Mr. Gladstein: It is not a witness called by me and it is a witness who has never accommodated me or discussed anything with me or indicated any willingness to discuss any of the testimony she was to give.

The Court: Well, I do not think the test of whether

a witness is being examined on direct examination or cross-examination is whether counsel has had the privilege of conversation with the witness. In any event, I will rule on the questions as they arise.

* * * * *

—Ch. Tr. 4538—

* * * * *

Q. Now at the time,—this is part of May, 1942—were you a director in the Solvay American Corporation?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Were you a director then of the Mexican Light & Power Company?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Were you not a director of the Barcelona Light & Traction Company?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Were you a director of Securities, Limited?

Mr. Gordon: Is there any way in which we can

—Ch. Tr. 4539—

stop this line?
Mr. Gladstein: No, there is not.
The Court: Mr. Gladstein, you may pursue that

inquiry as far as you choose but I shall continue to rule the same way. It does not seem to me to be material here as to how many directorships this witness held, and as far as the book is concerned if you desire to note the fact if it be the fact that his name was in that directory. I will permit you to do that.

Mr. Gladstein: I have a late edition, and not the one that was current then.

The Court: The question is how they administered the jury system—

Mr. Gladstein: And who administered, and with what biases, prejudices and interests.

The Court: I don't think it is material to ask each one of the men who administered the system where he lives and who he married and how much money he has or how many directorships he has or how poor he was; all those circumstances seem to me to have no bearing.

Mr. Gladstein: However, your Honor will permit me to ask the question?

The Court: I certainly will. I don't see any reason why you should not except for the passage of time.

—Ch. Tr. 4540—

Q. Were you also, as of May 1942, a director of Amitas, which was a corporation?

Mr. Gordon: Objection.

The Court: Sustained.

Q. Were you then a director of Compagnie Hispana Americana, Spain?

Mr. Gordon: Same objection.

The Court: Sustained.

Q. Were you a director of the Missouri, Kansas Pipeline Company?

Mr. Gordon: Objection.

The Court: Sustained.

What purpose can be served, Mr. Gladstein, by you reading them off? You might go on with a thousand. I would always rule the same.

Mr. Gladstein: Not a thousand, because he was not a director of a few corporations.

The Court: If it is to give the impression that the facts are as stated in your questions, despite my rulings that the questions are not relevant, then I think you are doing something that it is not proper for an attorney to do.

Mr. Gladstein: I am sorry, your Honor. I am prompted to disagree with your Honor's view.

The Court: Well, you may proceed, but I am begin-

—Ch: Tr. 4541—

ning to suspect that if it is another instance of what we have had earlier in this trial, and you ought to know better than to try to convey the impression as to what the answers might be by the iteration of questions to which I have sustained objections,—

Mr. Gladstein: Then in that event I will have to refer for the record to Mr. J. Donald Duncan, who—

Mr. Gordon: I am going to object to Mr. Gladstein, under all the circumstances, reading from a book which was offered in evidence and was rejected.

The Court: I have told Mr. Gladstein if he desires to have it appear that Mr. Duncan's name is in the book I will permit that, but I will not permit him to go on to say the number of different corporations he

claims he is a director of except those that I have ruled out.

Mr. Gordon: If Mr. Gladstein will show me the page in the book, I will agree his name is in there if it is.

Mr. Gladstein: On page 1912 of Poor's Register: Mr. J. Donald Duncan—

Q. Were you born in 1894? A. Yes, sir.
Q. At East Orange? A. Yes, sir.
Q. A graduate of Columbia University—

The Court: Now that it seems to me is open to the same objection I voiced a minute or two ago.

—Ch. Tr. 4542—

Mr. Gladstein: I just want to identify the gentleman as being the one who is here.

The Court: I understand that you say it, but it sounds a little devious to me.

Mr. Gladstein: Nothing devious. It indicates this is the Mr. J. Donald Duncan.

The Court: It has been conceded by Mr. Gordon that his name appears in the book.

Mr. Gladstein: In that column about six lines above the bottom commences the name of Mr. Duncan.

The Court: I did not permit you to read it.

Mr. Gladstein: I just want the record to show what I am talking about. I am not going to read—

The Court: Then I will change my ruling and the reference to the book is out. If you choose to abuse the matter that way I will dispose of it.

Duncan—Direct
Colloquy

Q. Were you a director of Sofina which is an international cartel?

Mr. Gordon: Same objection.

The Court: Sustained.

Mr. Gladstein: And I also want to say for the record that Mr. Duncan's name appeared as a director— .

The Court: I have withdrawn my permission to state his name was in the book. I found after I did that you did what seemed to me to be abusing the

—Ch. Tr. 4543—

privilege, so you may not make reference to his name appearing in other books. I consider it entirely irrelevant.

Mr. Gladstein: I offer to prove that if the witness were permitted to answer the questions I have put to him, and other questions of the same nature, he would testify in answer to those questions—

Mr. Gordon: I object to this.

Mr. Gladstein: I am making an offer of proof.

The Court: Mr. Gladstein, I consider the questions which you asked, and as to which I sustained objections, as clearly showing what you offered to prove and I direct you to desist in making any further statement of an offer of proof, or alleged offer of proof, in connection therewith.

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—Ch. Tr. 4559—

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Mr. Gladstein: I have no further questions, with this exception: I now ask the Court to reconsider

and reverse its previous ruling with respect to the document, and I want to argue some law. This is a document, which is a letter written by this witness—

The Court: I am afraid, Mr. Gladstein, that you are not going to have the opportunity to do it. I have ruled that I will hear no argument on matters, at the time that I announced it, and I have given that careful thought and consideration. It came up before, and I do not desire to hear further argument.

—Ch. Tr. 4560—

Mr. Gladstein: But, your Honor, upon the pretext that this is a confidential document, the one that I am asking about, the one that was written by this witness, you are preventing me from showing without any question the final proof of the corruption of the system here in so far as they placed in charge of it a man who was the director of a dozen corporations, who—

The Court: Mr. Gladstein—

Mr. Gladstein: May I finish, Judge?

The Court: I consider your language offensive and not fitting for an officer of this court to use when you speak of a ruling by the Court as done under a pretext, and use such other language as you used there. You must know that you are doing something that you should not do, and I direct you to desist.

Mr. Gladstein: Your Honor, I ask that you consider the law that applies to this question because—

The Court: I heard what you said.

Mr. Gladstein: Do you refuse to have a memorandum of law submitted to you?

The Court: And I consider the language offensive.

Mr. Gladstein: Do you—

The Court: And you know, you know that it is, but of course it may be pleasing to some of the people.

—Ch. Tr. 4561—

Mr. Gladstein: Well, that is not—I have never said anything—

The Court: But that is an additional reason why you should not do it.

Mr. Gladstein: I have never said anything for the purposes of pleasing anyone here but for the purpose of trying to put in evidence and to persuade your Honor to do what I think the law requires.

The Court: Well, you are not going to provoke me, so you might as well stop doing that.

Mr. Gladstein: I want to make an offer of proof concerning this letter which, according to the witness's statement, is in this building and readily available and which, by the way, Mr. Duncan, it was called for in the subpoena that was served on you—isn't that so?

The Court: I direct you not to make this one. It is already sufficiently evident in the case what the paper is and what your claims about it are, and mere repetition of it will only serve to use up your time that you can employ to better advantage.

Mr. Gladstein: All right. Let the record show that it is a letter written in May 1942 by Mr. Duncan, the present witness, and let the record further show that I called for that letter, and for the letter or

questionnaire in which it was a response, to which it was a response—

—Ch. Tr. 4562—

The Court: Now Mr. Gladstein, you have again done what I have told you not to do.

Mr. Gladstein: I want the record to show that I had the subpoena served on this witness. Can it not show that?

The Court: I understand what you want, but the accumulation of these acts of disobedience to my rulings is something that concerns you, and I hope that you won't keep at it any more.

* * * * * *

—Ch. Tr. 4589—

Mr. Gladstein: Now I make an offer on my own behalf that this be received. You will recall—

The Court: Do you consider what Mr. Connolly testified to as verifying each statement of fact in the book?

Mr. Gladstein: I am offering it as admissible because the introduction, which he says was subtantially the same in the 1946, 1947 and 1948 issues covers the issue or the copy which Mr. McKenzie used in 1947.

Mr. Gordon: I don't think the book is relevant to the challenge, your Honor. Mr. McKenzie said he sent somebody up to the library—and now I have

—Ch. Tr. 4590—

got confused about this once before because I did not know how many directories of directors there were and I don't want to make a misstatement—

The Court: I will hear you, Mr. Gladstein, and I am hopeful. I did not understand just what the book purports to prove that is relevant here so if you have a brief argument I will listen to you.

Mr. Gladstein: Yes, sir. I will make it as brief as possible. Mr. McKenzie testified that in 1947 Poor's Register of Directors was used as a source from which to obtain the names of jurors. Mr. Connolly has testified that the introduction contained in Challenge Exhibit 22 for identification is substantially the same, except for changes in figures as that introduction which appears in the 1946, 1947 and 1948 editions of Poor's Register of Directors, because the introduction in Challenge Exhibit 22 states, in part, that Poor's Register of Directors and Executives covering the entire United States is the only national directory of important people published in this country. It goes on to state additional facts—

The Court: Oh well, then I will sustain the objection.

Mr. Gladstein: I thought when you heard the facts you would, Judge.

—Ch. Tr. 4591—

Mr. Gordon: I move to strike that out.

The Court: Yes. That is another one of those remarks, Mr. Gladstein, that is exceedingly impertinent and sarcastic and I don't think you should do it. You just keep it up. Evidently you have some purpose in mind, but I direct you not to do it again.

* * * * *

—Ch. Tr. 4663—

New York, March 1, 1949

* * * * *

Q. And "Furrier, any factory or shop" is a manual worker? A. A furrier who works in any factory or shop is a manual worker.

Q. Well, what does it say in the book? A. It says that.

Q. Where does it say "who works"?

Mr. Gladstein: Are you saying—

A. Furrier is a manual worker except as a dealer.

Mr. Gordon: Your Honor—

The Court: Yes, I do not understand why you do not do what counsel asks you to do.

Mr. Gladstein: Which is what, read the book that is in evidence?

The Court: To read the title as it appears in the book.

Mr. Gladstein: Does your Honor want the witness to read what is in evidence?

The Court: That is precisely what I told her to do.

Mr. Gladstein: All right, I am sure the witness will be glad to accommodate the Court.

The Court: Yes.

Mr. Gordon: I take it that these interruptions don't come off the cross-examination?

—Ch. Tr. 4664—

The Court: Well, that is part of Mr. Gladstein's studied insolence. I understand it perfectly.

* * * * *

—Ch. Tr. 4700—

Q. Do you recall making this statement in addressing the Association: "Each of you occupies a prominent place in this community"—

Mr. McGohey: If you Honor please, I object to reading anything from this document. If it is going to be offered in evidence let us find out if it is going to be admissible.

Mr. Sacher: All right. I offer it in evidence.

Mr. McGohey: I object to it.

—Ch. Tr. 4701—

The Court: Objection sustained.

Mr. Sacher: Will your Honor hear me at all on this?

The Court: No, Mr. Sacher. I told you this morning that statements, whether they are in speeches or books or wherever they may be, are not, in my view, competent evidence. I think it is better now to address yourself to the facts, to ask the witness on matters of which he has personal knowledge.

Mr. Sacher: But the Judge—

The Court: Not the matter of the speeches and the books and things of that kind. Now you have done quite a little of that, and I think it is better for you now to address yourself to things that the witness actually did and what he saw and observed. You know, that word "know" we have had that come up two or three times already, and it is very easy for a person to say that he knows this or that when all he means by it is that he has been informed by somebody that that is a fact.

Darr—Gross
Colloquy

Mr. Sacher: Your Honor—

The Court: I suggest—

Mr. Sacher: Your Honor, I wasn't present at the discovery of America but I believe with all the faith I have that Christopher Columbus discovered it in 1492.

—Ch. Tr. 4702—

The Court: Well, I will strike that remark out.

Mr. Sacher: But I would like to make one brief observation—

The Court: I will rule now, Mr. Sacher, that you should address yourself to questions within the witness's knowledge of what he observed, and that you leave for the moment the matter of speeches and addresses and things of that kind which I feel are entirely incompetent and inadmissible.

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—Ch. Tr. 4781—

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Mr. Sacher: May I respectfully say to your Honor that membership in the American Youth for Democracy has no bearing on the credibility of this witness than the fact that Judge Knox is director of two of the biggest corporations in this country.

Mr. Isserman: Or that your Honor is in the Social Register.

—Ch. Tr. 4782—

The Court: You see, you are beginning to get into that same old sort of thing that we drifted out of

a week or two ago, and I think it is better to just make the objection and eliminate the arguments.

Now I overrule the objection, and the witness will answer the question.

Mr. Gordon: Will you read the question?

The Court: Please bear in mind, Mr. Darr, that when you do what you did a moment ago, to make a little speech, it is not very relevant to the question. I think you would do better to avoid it.

Mr. Gladstein: Let the record show my objection to the Court's gratuitous and improper characterization of the witness's testimony, as an effort to make a speech—

The Court: You may—

Mr. Gladstein: Well, I would like to finish what I have to say, because having—

The Court: Mr. Gladstein, this is one time when you are not going to finish what you want to say.

Mr. Gladstein: I object to the Court's statement.

The Court: Very well.

Mr. Gladstein: And I except to the ruling.

. . . . . .

—Ch. Tr. 4817—

. . . . . .

Mr. Sacher: May it please the Court, I am impelled to rise because I believe that today's manner of the conduct of the trial constitutes something in the way of the characterization of all that your Honor has done throughout the trial of this challenge.

Colloquy

The Court: Well, you know I said I did not de-
—Ch. Tr. 4818—
sire to hear argument and I have been called so many things during this trial here that I suppose I can stand being called a few more. But it seems so unnecessary. Your record is complete here. If your objections are well taken why then you will get that reversal that you and your colleagues have so often proclaimed as the inevitable consequence of the result of my rulings. There it rests. I see no advantage to be gained by your further excoriating me and I direct you not to do it.

If you have some motion to make I will hear the motion, but I don't want to hear any more argument.

TRIAL TRANSCRIPT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 128-87

UNITED STATES OF AMERICA

—vs.—

WILLIAM Z. FOSTER, EUGENE DENNIS, also known as Francis X. Waldron, Jr., JOHN B. WILLIAMSON, JACOB STACHEL, ROBERT G. THOMPSON, BENJAMIN J. DAVIS, JR., HENRY WINSTON, JOHN GATES, also known as Israel Regenstreif, IRVING POTASH, GILBERT GREEN, CARL WINTER, and GUS HALL, also known as Arno Gust Halberg.

Before:

HON. HAROLD R. MEDINA,

District Judge,

and a Jury.

New York, March 7, 1949

10.30 a. m.

. . . . . .

—Tr. Tr. 4—.

. . . . . .

Mr. McCabe: Yes, your Honor. My reason for interrupting was that I wished at this time to renew

and repeat a motion which has heretofore been made and denied, that is the motion that your Honor now disqualify himself from further proceeding in this case. It has seemed to me that the circumstances which arose during the course of the trial of the challenge more than justified our allegation that your Honor's state of mind was not one of detachment and freedom from bias. I felt that that developed and progressed through the trial, and was demonstrated fully in the circumstances surrounding the conclusion of the trial of the challenge, the cutting off of evidence and the refusal to hear oral argument, the necessity for which I think appeared in the opinion which your Honor filed.

I have gone through the transcript not in great detail but in sufficient detail it seemed to me to demonstrate fully that your Honor deprived us of the right to present our argument fully and fairly to the extent of occupying the time necessary to develop our point. I developed some quotations, and I do not wish, of course, to burden this argument with a repe-

—Tr. Tr. 4-A—

tition of those quotations at this time which indicate both the bias which your Honor showed, the sarcastic approach which your Honor adopted towards the argument of counsel and toward our evidence. Your Honor's cutting us off in our proof and directing the order of proof seemed that your Honor was quick to jump upon the slightest mote in the eye of any defense counsel, witness—

—Tr. Tr. 5—

The Court: Do you think you need to elaborate very much longer, Mr. McCabe?

Colloquy

Mr. McCabe: No, I do not, your Honor.

The Court: Because I want to indicate to all counsel now that I am not going to permit any more lengthy arguments or repetitious arguments during this trial when I have the jury present. I shall expect counsel to make argument when the Court desires argument, and when I feel sufficiently informed to rule the matter will rest there.

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—Tr. Tr. 22—

The Court: I do not think I want to hear any more argument on it, Mr. Crockett. You made so many motions, you and your colleagues, about the press and about this alleged propaganda against the defendants, and so on, and it is really a renewal of the same motions that I have denied repeatedly before.

Mr. Crockett: Well, will the Court permit me to just enumerate the occurrences that I desire to refer to?

The Court: No, I do not think so. I find that the slightest opportunity we have these long arguments that I cannot help but feel are meant for purposes of outside the Court rather than to influence the Court in its decision, an dit seems to me that unless there is something different in character from what you have already adverted to, it may be omitted. Now if it is just the sort of thing that you have already spoken of, and it is merely an accumulation of further instances, I do not think that I require

to have it, unless it is something of a different character that you pressed upon me earlier, not only on former occasions but earlier this morning, why, I will hear it. I do not desire to cut off argument that is to the point but I do feel that there must be some point at which this repetition must cease.

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—Tr. Tr. 27—

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Mr. Crockett: If the Court please, I should like at this time that the trial of this case be continued for the period of 90 days, and in support of that I reoffer the affidavit of the defendant Benjamin Davis.

I have only one argument I should like to address to the Court and that is it might very well be that at the expiration of the 90-day period the Court would be in a better position to assess the extent to which the minds of the public have been influenced by the wave of propaganda to which I have referred and therefore to determine whether or not it will be possible in the future for these defendants to obtain a speedy trial before an impartial jury, and I respectfully submit the trial should be continued for the period of 90 days.

Mr. Gladstein: May I say something on that point?

The Court: Yes.

Mr. Gladstein: I gather from your Honor's remarks this morning the Court regards speed as something of a virtue—

Colloquy

—Tr. Tr. 28—

The Court: Well, I don't know. A good many people have different opinions on that. You have always been arguing, you and your colleagues, that I have been rushing you to trial. It has not seemed that way to me.

Mr. Gladstein: That is a matter of opinion.

The Court: And I suppose you and I cannot be expected to agree on that.

* * * * *

—Tr. Tr. 93—

Mr. Gladstein: If your Honor please, I wish to file a challenge to the array of jurors on a motion to quash and dismiss the petit jury panels of March 1, 1949, and March 7, 1949. I notice it says "8th" on the face of the document but I assume that can be deemed to be corrected to say the 7th, as I am advised by the clerk of the court that the jury which your Honor was calling for a moment ago is the petit jury panel of March 7, 1949.

Will you give this to the Judge, please (handing)? And I have a copy for Mr. McGohey (handing). And I wish to call attention—

The Court: You better wait until I read it first.

Mr. Gladstein: Very well, your Honor.

—Tr. Tr. 94—

The Court: I do not wish to hear argument on it, Mr. Gladstein.

Mr. Gladstein: I simply wanted to say this: When I handed your Honor the papers it was 17 minutes to three. When your Honor just put the papers back

on his desk and looked up indicating he had read the papers it was, and is, 15 minutes to three. It seems to me, your Honor, I should be permitted to point out the respects in which this challenge presents new matter to which the Court's attention has not heretofore been called. Moreover, this is a challenge—

The Court: Did you hear me say I did not desire to hear argument, Mr. Gladstein?

Mr. Gladstein: All right. Then I desire to put in evidence, and I want to call two witnesses whom I have under subpoena.

The Court: Let us hear what Mr. McGohey says first, and I will rule on it now.

Mr. McGohey: If your Honor please, I have read these papers substantially and I find that there is contained in these papers the same kind and substance of challenge that we have been trying for seven weeks, and indeed, I find that in the notice of motion it says, "That said challenge and motions will be based on all the records, papers and files in this proceeding, the affidavit of Henry Winston filed

—Tr. Tr. 95—

herewith, and evidence to be introduced at the hearing of the challenge and motions, and some memorandum of authority."

I take it there is included in the description all of the evidence and all of the charges and all of the testimony we took during seven weeks. I understood that challenge to go to the whole system of offering jurors here and to the whole system of list of names that have been and are compiled in the

jury clerk's office pursuant to that system, and I take it that that challenge included any jury drawn prior to the time that the challenge was made or drawn while the challenge was in progress, or that would be drawn in the future from jurors whose names had been placed in the jury files in accordance with the system which was under the challenge, I therefore submit that to make the motion now made is merely a repetition of the motion we have been considering for seven weeks and which your Honor, after consideration denied with an opinion. I am opposed to the taking of any testimony or spending any more time on the challenge and I urge that it be denied.

The Court: Both for the grounds mentioned and others I overrule the challenge and deny the motion.

Mr. Gladstein: May I point out that there is nothing in the record at the present time to show

—Tr. Tr. 96—

that the March 7, 1949, panel was drawn in the same manner and from the same group of names from which prior panels have been drawn, and I would desire to have evidence on that score and if it be the fact that the March 7th panel was drawn from the same file—

The Court: Mr. Gladstein, do you remember I said I did not desire to hear argument on this?

Mr. Gladstein: That is on behalf of the challenge.

The Court: If you persist I shall not try to stop you.

Mr. Gladstein: No. I am trying to reply to Mr. McGohey's point. I do not want the record left in

the condition where it may later be argued that we failed to establish that the March 7th panel was drawn in that particular manner, and the sources from which the names came, and I desire to put Mr. McKenzie, who is under subpoena, and Mr. Duncan, the jury commissioner, who is under subpoena, on the witness stand, and I ask leave to put them on now, and if it develops that names on the March 7th panel were drawn from the same file of jurors, then to the extent that we have already put in evidence on that subject I certainly would not want, and would not attempt, to go through the process of putting on similar evidence. I do reserve the right to put on

—Tr. Tr. 97—

evidence as to evidence concerning this petit jury panel which is here now, and I certainly have the right, I submit, to call these witnesses to establish just how the people who are on this panel happen to get there, including all of the presidents and officers here of fantastically large numbers of corporations—

The Court: Mr. Gladstein, what do you think the Court should do where an attorney is repeatedly told to desist from argument and he continues? Do you desire me to make some sort of brawl out of this proceeding? I am accustomed to having attorneys treat my directions with respect.

Mr. Gladstein: I would like a ruling on my right, and I would like to have the record show I desire now to have the court attache call Mr. Duncan or Mr. McKenzie, I don't care which, first to the stand at this time.

Colloquy

The Court: But the challenge has been overruled and your motions have been denied.

Mr. Gladstein: Has your Honor ruled I am prevented now from putting on the testimony of these witnesses?

The Court: I certainly have. You are not going to have any more testimony about the jury system. We are going ahead with the trial, Mr. Gladstein.

Mr. Gladstein: But, your Honor, may I have a ruling? Is it your Honor's ruling that I am now

—Tr. Tr. 97A—

prevented, despite my offer to introduce evidence, from putting on testimony concerning the March 7, 1949, panel?

The Court: I have ruled, Mr. Gladstein, that the challenge and motions that you have just submitted to me are respectively overruled and denied and the incident is closed.

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—Tr. Tr. 99—

Mr. Gladstein: Now at this time I wish to move for a severance of the cases of these defendants and request the Court to order the severance of each and every of 10 of the cases of the defendants, and order that the trial, if it proceed at all, proceed against one only of the defendants. * * *

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—Tr. Tr. 104—

The Court: You do not need to cite cases on such elementary propositions. These conspiracy trials go on all the time, and I do not want to hear any more argument on it. The motion is denied.

Colloquy

—Tr. Tr. 105—

Mr. Gladstein: Now, your Honor, I want to call your Honor's attention to the fact that the Second Circuit Court of Appeals, of this circuit, and other courts, the Supreme Court of the United States, state decisions in New York, have recognized that in matters of this kind, cases of this kind, it is not a discretion—

The Court: Do you realize that I just told you that I do not want to hear any further argument on it?

Mr. Gladstein: Because of your Honor's direction which I construe as a requirement that I be seated and proceed no further with my motion for a severance, I am required to do that, and I reserve the right, of course, to file, as I will, a full motion for severance and supported by such arguments—

The Court: No, you won't file any such formal motion. You can just let the matter rest where it is. The motion for a severance is addressed to the discretion of the Court. I am familiar with the authorities on the subject. I don't need any argument on the law. You have stated such facts as you relied on and I see no occasion for putting in any written motion papers.

Mr. Gladstein: But your Honor cannot cite properly that I have cited such facts as I want to rely on because you haven't given me—

—Tr. Tr. 106—

The Court: Well, you are arguing on the law, and I am beginning to get the same sort of impression I got after two or three weeks of that other proceeding there. Now I have denied this motion

and I do not desire to hear any further argument. I do not like to be unpleasant to lawyers and tell them to sit down and do things like that. I don't act that way. It is contrary to my nature to do it, but when I tell a lawyer I don't desire any further argument, why I expect him to desist, and you would be surprised to see how many times you and your colleagues have utterly disregarded such instructions by me.

Mr. Gladstein: I was not going to disregard them; I simply wanted the record clear that my restraint and my refraining from continuing was based upon my construction of your Honor's statement as a direction and a ruling to sit down and not continue with this presentation.

The Court: Well, I don't regard it as "restraint" when a lawyer obeys a direction of the Court. I have never known any of you gentlemen particularly to restrain yourself in this case, but possibly the time will come when you will.

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—Tr. Tr. 134—

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The Court: You know, Mr. McCabe, I am beginning to get the impression that you gentlemen are trying to keep talking so long this afternoon that we won't have any jurors in, but I will let you know now we are, so if you talk on for half an hour or longer you are going to start having the jurors come in just the same.

Mr. McCabe: I thought that was obvious.

Mr. Gladstein: And I think I should let the Court know when I make our motions it is to make a serious motion.

The Court: Some have not sounded very serious.

Mr. Gladstein: And our expectation is our motions will receive serious attention.

The Court: That is what they have been receiving.

Mr. Gladstein: And as far as the hours are concerned the Court, your Honor, will recall in our desire to introduce more evidence on the question of the challenge last week and the week before we requested that the hours of hearing be lengthened and we announced our being prepared to spend time in evening sessions because of your Honor's limita-

—Tr. Tr. 135—

tion of our right to put in evidence and you made it impossible for us to do so within the time limit, and I want to object for the record to the characterization your Honor has made that it seems to your Honor that we are speaking about these matters simply for the purpose of using up time. Judge—

The Court: If this has not been stalling this afternoon I never observed it in my life.

Mr. Gladstein: Then I want to say I will stall in an effort to get for my client the constitutional right to a public trial which we have not had today because first, by virtue of an order either from your Honor or from Mr. Saypol people were excluded and, secondly, your Honor made an announcement here in court countermanding the order that excluded the public and here we are at four o'clock and people are

still being excluded, and I say that what your Honor has done today, either directly, indirectly, actively or passively, constitutes a denial of a public trial and I object to it and I ask a voiding of the proceedings since this morning and an opportunity to make in public every motion that I desire to make in the interests of my clients.

The Court: Mr. Gladstein, that word "indirectly" I consider offensive and not respectful to the Court.

Mr. Isserman: If the Court please, I object to your Honor's characterization of the conduct of

—Tr. Tr. 136—

counsel as stalling and also respectfully object to the Court's remark about misrepresentations. I was at the door only a few minutes ago and heard the captain of the guard tell Mr. McCabe, "My orders are my orders, and I admit no one." But I call this to the Court's attention in view of the fact that the courtroom is as empty as it has been all day.

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—Tr. Tr. 141—

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Mr. Sacher: I respectfully submit, your Honor, that in this case it is appropriate that there should be direct examination by counsel themselves instead of through the Court. Among the reasons that I have to advance in support of that proposition are the following: As I envisage this case this is fundamentally comparable to the so-called criminal libel or seditious libel cases in which I regard the function

of the jury to be to decide the law as well as the facts as they do in criminal libel and seditious libel cases, and in those circumstances I think it is of the utmost importance that there should be an immediate and direct contact between counsel and jurors.

In that connection I should like to observe that

—Tr. Tr. 142—

Judge Knox had occasion to say in his book "a Judge Comes of Age" the following at page 250: Speaking of the trial of Attorney General Daugherty he said the first day was entirely spent in selecting the jury.

There is really nothing funny about this.

The Court: I was just thinking it was only a little while ago you were talking about Judge Knox's book in a rather different way. But you can do that. That is all right.

Mr. Sacher: But this is a statement of fact.

The Court: I am not going to stop smiling when I see some occasion to smile just because Mr. Sacher does not like it.

Mr. Sacher: It is not the smile. I welcome smiles. I indulge in them a good deal but I don't think you ought to treat this argument with levity because I think it is an important question.

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—Tr. Tr. 406—

New York, March 10, 1949

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The Court: Perhaps the argument will be included as you specify. Do you think it necessary to do so?

Colloquy

Mr. McCabe: I think I have—in order to avoid repetition I made some notes here and I think I can get them briefly on the record. I think some of them have already been made but I think they should be repeated at this time, your Honor, after the examination.

The Court: They are not sufficiently manifest in the numerous questions that have been submitted to me and which I have rejected?

Mr. McCabe: I think not, your Honor.

The Court: Will your colleagues get up and repeat the same objections that you are making?

—Tr. Tr. 407—

Mr. Gladstein: I think that kind of question, to which I want to object, is obviously improper. We have minds of our own and we will use them.

The Court: You see, repetition, Mr. Gladstein, I tried to avoid it. Do you mean to assure me that you will not repeat what Mr. McCabe is just saying? Is that what you rise to say?

Mr. Gladstein: No. I rose simply to say this, that neither Mr. McCabe nor anyone else should be asked by the Court to speak for me, and I certainly will make no effort to speak for any other attorney who represents his clients.

The Court: Very well.

Mr. Gladstein: I represent mine.

The Court: Very well, I will hear the repetition, if there be any.

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Colloquy

—Tr. Tr. 412—

The Court: And I do not see why we need have so many various and sundry protests against the same identical thing. I have ruled on it.

Mr. Gladstein: I know, but—

The Court: You have been protesting vigorously from the beginning. How do you suppose it avails to continue to protest and have the jury sent out of the room, with the inconvenience that occurs to everybody while you say over again what you said before?

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—Tr. Tr. 421—

The Court: Well, it is the old story. We have argument when I ask counsel again and again not to do it, but there seems to be no way whatever to get you lawyers not to argue. I suppose the only thing for me to do is to tell you again not to do it and then let the record speak for itself.

Mr. McCabe: Well, without citing the other instances—

The Court: I do tell you again now not to do it.

—Tr. Tr. 422—

Mr. McCabe: My point was that Mr. Johnston, despite your Honor's 12 or 13 different injunctions and admonitions that you wanted a revelation of any bias—in fact, with Mr. Reese, you yourself suggested, "Don't you think the fact that you knew Mr. Coakley, that that would have an influence on you?" You suggested that and excused him. Despite all that, Mr. Johnston, who is an honest man, sat there and did not reveal the bias which was in his mind

all the time, which was brought out through a chance remark concerning the Holy Name Society, and that bias was not generated in the jury box.

The Court: Mr. McCabe, you have committed in my immediate view and presence here in the last few moments a deliberate and wilful contempt. I just want you to realize it. I don't know how many times you are going to do it. I am not going to start any contempt proceedings now, but what I may do hereafter, I don't know. But I want to have it plain that what you have done just here a few moments ago is a wilful and deliberate disobedience of my command.

Mr. McCabe: You mean with respect to argument?

The Court: If you desire to go further, after what I have told you, why, that is up to you, but I don't really see how any self-respecting member of

—Tr. Tr. 423—

the bar can do it.

Mr. McCabe: Well, then, I will refrain from anything else. I certainly intended no contempt, your Honor.

The Court: Well, you see—

Mr. McCabe: I was bringing out your Honor's efforts to draw from the jury any bias, repeated efforts, which had not, in view of the generality of the questions, that's all. Finally the bias was acknowledged by the juror, and he obviously wanted to be perfectly honest on it, and then your Honor excused him, and then it was pointed out, at the direction of the—

The Court: You don't think you are going to provoke me into any hasty action? You are not going to do it. You should know it by this time, and there is no use continuing those efforts.

Mr. Gladstein: May I state my objections for the record?

The Court: Yes.

Mr. Gladstein: I object, first, on behalf of my clients to the manner in which the Court has conducted the questioning, for the reason, first, that it has placed me, as the representative of two defendants here, in a position such that when a seat in the jury box is vacated and a person from the back of the room is called to that place, in so far as

—Tr. Tr. 424—

everything that has occurred prior to that time in the questioning by the Court, that person who takes that seat is, to me, a masked person, a person about whom I know nothing, a person whom I have been unable to observe, a person—

The Court: Do you realize, Mr. Gladstein, that the noting of your objection could be very briefly stated without argument?

Mr. Gladstein: That is the first aspect of my objection, to the manner in which the Court conducted the examination. The second aspect is that the Court committed prejudicial error in so far as the rights of my clients are concerned when the Court said to the jurors, and to us in effect, that the Court did not desire to pry into the personal affairs of

the jurors and placed, by necessary effect, placed me in a position where, merely by asking that the Court request information in the usual manner on usual matters concerning the employment and activities and the location of not only the juror but those in the immediate family of the juror, it placed me in the position where, by pressing for the asking by this Court of those usual questions, I was placed in a light whereby the jurors might think I was seeking to pry into their personal affairs improperly.

I next want to object to the content of the Court's

—Tr. Tr. 425—

questioning, and particularly of the formulation to which Mr. McCabe has adverted, and I desire particularly to say that, so far as that type of question is concerned, my objection goes to the proposition that it does nothing to ascertain the state of mind, in fact, of the juror; and I will disagree with Mr. McCabe to this extent, I don't even think the juror is permitted to be an honest and fair judge of the existence or non-existence of bias, prejudice, interest or any other state or frame of mind that would make it improper for the juror to sit.

I object to the Court's formulation of that type of question because it does not tell, it does not advise the juror as to those things that the juror must ask himself in order, if he gives an honest answer, to enable him to know whether he could be fair.

The Court: You realize, Mr. Gladstein, that instead of noting an objection, you are making an argument.

Mr. Gladstein: I intend only to note an objection.

Colloquy

My third point of objection—

The Court: Don't think you are fooling me.

Mr. Gladstein: I did not intend to fool your Honor or anybody else. I intend simply to state—

The Court: I know the difference between noting

—Tr. Tr. 426—

an objection and making an argument; but if you desire, contrary to my express command, to go on arguing, you may do so.

Mr. Gladstein: Your Honor, I am stating the grounds—

The Court: I am not going to use any physical means to stop you.

Mr. Gladstein: I am stating the grounds of my objection.

The Court: Go ahead.

Mr. Gladstein: My third objection is to the direction of the Court with respect to the number of preemptory challenges to be exercised, the manner in which they are to be exercised and the order in which they are to be exercised. By this direction—

The Court: Now, period. That is the end of the point.

Mr. Gladstein: Can I not—

The Court: The rest is argument.

Mr. Gladstein: Can I not say the grounds of my objection?

The Court: I think you have stated a sufficient objection. I don't see that there is anything that need be added. If you are right, you are right. That is all there is to it. I am not going to change that ruling.

Colloquy

—Tr. Tr. 427—

Mr. Gladstein: Very well. I now object to the Court's statement which forces me, by virtue of what the Court has already said, particularly, to Mr. McCabe and also to me, forces me to sit down, unable to—

The Court: Forces you to sit down, Mr. Gladstein, after you submitted briefs on this same point to me yesterday? Both sides submitted briefs. Now you stand there and assert that I am in some way prejudicing you by not letting you argue more, is that the point?

Mr. Gladstein: Your Honor, the briefs are not a matter of record and what I say here I trust is a matter of record. It is intended to be a matter of record, and I intended to state my objection and the grounds for it.

The Court: I don't desire to hear any argument. Does other counsel desire to be heard?

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—Tr. Tr. 454—

New York, March 11, 1949

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Mr. Gladstein: Well, I want first to address myself to the requirement that we be required at this time to begin the exercise of peremptory challenges. I want the record to show that I am not satisfied at all in respect of any of the 12 jurors in the jury box as regards my right to challenge for cause. My ground for that objection is that I submit there has been inadequate effort to obtain expressions from

—Tr. Tr. 455—

each and all of the jurors so as to establish what the frame or state of mind of the jurors may be. Hence I am in a position where I am required to exercise peremptory challenges blindly. Moreover, I am in a position where I cannot appropriately ask for the completion of the examination for the purpose of establishing the existence of facts which would establish the basis for a challenge for cause against one or more of the jurors. Therefore, for the record, I challenge for cause each and all of the jurors.

The Court: The challenge is overruled.

Mr. Gladstein: Now I want to say that without further examination of the jurors, I object to the requirement that compels me to exercise peremptory challenges against jurors concerning whom I have inadequate information as a result of the only, and I submit, inadequate and improper examination of the jurors by the Court, and hence I am placed in the position of choosing between strangers, choosing whether to challenge persons concerning whom I have inadequate information—inadequate in the sense that the questions have not brought out that which normally and usually and traditionally is brought out in the case so that an intelligent and an informed exercise of a peremptory challenge may be had. Consequently I am placed in a position, and for that reason I object—I am placed in a position

—Tr. Tr. 456—

of exercising peremptory challenges against persons in the jury box whose acceptability as jurors has

not been established in one way or another and as to which I am unable to do anything.

Now I further want to record my objection to the statement just made by the Court which requires the exercise of three challenges at a time. I object to that. I submit that the appropriate thing to do is to permit the challenging of one juror; when that seat is vacant, another be called and questioned, and that the challenges be exercised in an orderly manner one by one; that at no time should there be, as a result of the exercise of a peremptory challenge, more than one seat vacant to be filled by another prospective juror.

The Court: Perhaps you, coming from outside of the State, are not familiar with the practice here.

Mr. Gladstein: That is possible, your Honor, but I want to say that coming from outside of the State I come with experience in the Federal courts in Hawaii, Washington, Oregon, California and Arizona. In none of those States is any practice followed which conforms to this. To the contrary, in all of these States the practice is, as a matter of fact, first of all, to require the Government to exercise the first challenge and the defense has the right

—Tr. Tr. 457—

to exercise the last challenge. And, moreover, the alternation between prosecution and defense is somewhat different than is here laid down. Also only one seat at a time is vacated by the jurors.

The Court: Well that is not done here.

Mr. Crockett: May it please the Court, on behalf of my clients I should like to adopt the objections

just made to the Court by Mr. Gladstein, and I predicate them upon my contention that they amount to a denial of due process of law to my clients, and that they amount to a denial of their right to a fair and impartial trial, both of which rights are guaranteed by the United States Constitution.

Mr. Isserman: If the Court please, I am obliged to object on the grounds urged by Mr. Gladstein and Mr. Crockett, and also wish to repeat here, without doing it at length, the objections made to the procedure made yesterday by counsel to the procedure which was followed by the Court, and adding my last ground that the total sum or the total effect of that procedure has been to deny my clients the right to a fair trial before an impartial jury in violation of the Constitution.

Mr. Sacher: I wish to interpose an objection on behalf of my clients, your Honor, on the ground that the nature of the examination of the jurors thus far,

—Tr. Tr. 458—

as well as the order in which the challenges are to be exercised and the number to be simultaneously exercised, deprives us of the ability to make an intelligent judgment as to which, if any, jurors are to be challenged peremptorily; secondly, that the requirement that three be exercised simultaneously, no matter how hallowed it may be by time, is an inherent injustice because it operates in form to give us more than the ten challenges which are secured to us by Rule 25—24, rather, but in actuality may operate to give us no more than six challenges.

The Court: The authorities seem to be against you on that, Mr. Sacher.

Colloquy

Mr. McCabe: I would simply like to add to the objections made by other counsel, your Honor, that your Honor's formulation of insisting that we exercise three challenges before we see and have a chance to hear answers to questions for the replacement of the first challenge, compels us to exercise our peremptory challenges without proper information and may very well lead not only to the wasting of a peremptory challenge in rejecting a juror who, in comparison with his replacement or with the replacement of the second juror challenged, may have been under the circumstances preferable to us.

The Court: Now there is one thing that I am

—Tr. Tr. 459—

very much puzzled about here in this trial. I don't know how many times, but it must have been—well, I think five or six anyway, I have stated that when one counsel or counsel for certain defendants makes an objection or notes an exception, that that inures to the benefit of all of the defendants, in the same manner and effect as though the counsel for each of the other defendants have stood up and repeated them, except in such instances where one of them desires to express his disassociation with the objection or exception. That being so, I cannot see why it does the slightest good to anyone to have one man state an objection and then each of the other counsel get up one after the other and repeat the same thing. I merely suggest that that consumes time and energy and is quite unnecessary.

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Colloquy

—Tr. Tr. 660—

New York, March 14, 1949

Mr. Gladstein: May I approach the bench?

Mr. Sacher: May we approach the bench?

The Court: All right.

(The following discussion occurred at the bench between Court and all counsel, not in the hearing of the prospective jurors:)

Mr. Gladstein: I want to challenge for cause all of the jurors who have been put into the jury box since my previous challenge for cause as to all of them upon all the grounds heretofore stated, particularly the inadequacy of the Court's inquiry to enable us to obtain from the jurors the facts, circumstances, names, organizations, expressions of opinion they have given or have heard, opinions formed, and so on, regardless of whether or not the jurors think that they are able to keep their minds open. We should have the right to learn from the jurors all the facts and circumstances that would

—Tr. Tr. 661—

assist us in exercising peremptories.

The Court: Overruled.

Mr. Sacher: I have an observation. I think that, particularly in regard to Jurors Nos. 5 and 11, that they ought—

The Court: Do you think it is proper for me to hear this in this fashion, Mr. McGohey?

Mr. Sacher: It is the only way it is heard.

Colloquy

The Court: I thought it was just once or twice, but now it is a regular thing every time there is a challenge to be exercised. I wonder. What do you think?

Mr. Sacher: In the light of new facts developed, I think we ought to have the right to lay them before your Honor for consideration.

The Court: I do not see why it should not be out in open court just like everything else. This huddling around does not impress me. I thought it was just once or twice, but if you are going to do it every time you challenge somebody else—

Mr. Sacher: These defendants—

The Court: No, I won't hear you any more this way. You make your objections in open court.

Mr. Sacher: I want to object on the record upon the ground that what you are ordering is prejudicial to the defendants.

—Tr. Tr. 662—

The Court: It happens all the time.

Mr. McGohey: That is what happens in every criminal case.

The Court: Very well. You go make your objections out in the open.

Mr. Sacher: And I want to object to the tone of voice in which your Honor said it.

The Court: My tone?

Mr. Sacher: Within the hearing of the jury.

The Court: I hardly spoke loud enough to be heard two feet away.

Mr. Sacher: Waving me aside from the bench—

The Court: I didn't wave you aside.

Colloquy

Mr. Sacher: —in the full view of the jurors. I saw it done.

The Court: I deny it.

Mr. McGohey: Let the record show that I saw no gesture by the Court which in any way could be construed as waving anybody away from the bench.

Mr. McCabe: And I certainly would like to put my comment on the—

The Court: You cannot do it here. You must do it back at the table.

(The following in the hearing of the prospective jurors:)

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—Tr. Tr. 697—

New York, March 15, 1949

. . . . . .

The Court: —you and your colleagues have made that argument to me a very considerable number of times in various ways and with various wording. I have indicated my ruling on it. I have also said, and I repeat, that any objection that is made on behalf of one or more of the defendants will inure to the benefit of all so that each counsel need not get up and repeat the substance or effect of what some other counsel has said because his own clients get the advantage of the objection and the exception.

. . . . . .

Colloquy

—Tr. Tr. 750—

Mr. McGohey: And I object to any argument before this jury about matters that were argued for seven weeks and disposed of by your Honor.

Mr. Sacher: But I object to Mr. McGohey's reference to seven weeks because he rises to object to something I have just mentioned—

The Court: Maybe it is better, Mr. Sacher, to let you go your own way, but I think possibly it may not be beneficial to you or to your clients; but I think you may argue as you see fit. I will listen.

Mr. Sacher: I wish to note an objection to your Honor's remark. I wish also to object to Mr. McGohey's interruption and his remarks because the things that I was recently addressing myself to and which apparently promoted him to rise were my reference to the number of employes and former employes of the Metropolitan Life Insurance Company who have paraded through the jury box.

The Court: How long do you think you will take with this argument, Mr. Sacher?

Mr. Sacher: It may take me some 15 minutes, your Honor.

The Court: Very well, we will listen. 15 minutes.

—Tr. Tr. 751—

I shall allow you.

Mr. Sacher: And if it will serve the convenience of the Court or the jury I shall make every effort to shorten it as much as possible.

I should like to observe in addition that, apart from the fact that the number of Metropolitan Life Insurance Company employes and former or retired employes who have been among the jurors called

for service in this box, is altogether disproportionate to the total number that have appeared in the box; secondly, I should like to observe that the position which Juror No. 9 holds with the Metropolitan Life Insurance Company is of such a character as that I respectfully submit he would properly have to be classified as being among the salaried servants of the Metropolitan Life Insurance Company. His point of view—

The Court: By the way, do you object to the disproportion of women—

Mr. Sacher: What is that, your Honor?

The Court: Do you object to the disproportion of women?

Mr. Sacher: I wish to object to that question. The ladies, God bless them, I love them and I have no objection to their being there. I welcome them.

The Court: I thought you might think there were

—Tr. Tr. 752—

too many.

Mr. Sacher: What is that, your Honor?

The Court: That is all right.

Mr. Sacher: I should like to observe, your Honor, that your question had no relevancy whatever to what I said, and it throws me off the track.

The Court: Well, you contend there were too many of one sort or another.

Mr. Sacher: Well, what has being an employe of a large life insurance company got to do with the sex of a juror? I do not see the relationship.

The Court: Well, possibly in view of the nature of your challenge that there was some question in your mind about it—

Mr. Sacher: No. The Supreme Court of the United States has said that there is no fundamental difference between the thinking of American men and American women, but there may be a difference between the thinking of the salaried servants of large corporations who are necessarily identified with the point of view of those large corporations, which requires us to make a differentiation between their point of view and the point of view of the rest of us who are not so employed and so identified.

Now when all these facts are borne in mind and

—Tr. Tr. 753—

when the Court bears them in mind the great efforts which my client, Mr. Benjamin J. Davis, has made on behalf of the Negro people, specifically against the Metropolitan Life Insurance Company and more specifically against its Jim Crow policy in Stuyvesant Town, and has fought for, insisted and introduced in the New York—

The Court: Now I am beginning to get your drift. I do not want to hear any more argument on it, Mr. Sacher. You will please desist. I will overrule your objection.

Mr. Sacher: Now, your Honor, I just—

The Court: I thought at first differently, but I see now the drift of your remarks, and I tell you that I do not desire any further argument on this. I will overrule the objection and you may proceed with your peremptory challenges.

Mr. Sacher: If the Court please, I wish to note an objection—

The Court: That is all right.

Mr. Sacher: —to the Court's ruling. You have cut off my argument at the very moment when the most telling basis—

The Court: Yes, when I saw it was designed for some persons out of the courtroom rather than in the courtroom.

—Tr. Tr. 754—

Mr. Sacher: Your Honor, I wish to object to that characterization. There are only 13 people in this courtroom to whom I wish to address my remarks; that is to your Honor as the Court and to the 12 men and women who constitute the jury.

The Court: Well, I am the only one to whom discussion should be addressed on this question.

Mr. Sacher: And I am doing that.

The Court: And I overrule your objection.

Mr. Sacher: I respectfully except and I except to the manner in which and the time at which your Honor cut off my argument in support of the challenge.

* * * * *

Mr. Gladstein: I desire to file a challenge for cause against a juror who, I submit, should be excused by the Court on the basis of cause, legal cause. That juror is Juror No. 5.

* * * * *

—Tr. Tr. 758—

The Court: The challenge is overruled.

Mr. Gladstein: But wait, your Honor, I haven't completed.

The Court: Well, it seems to me—

Mr. Gladstein: May I—

Colloquy

The Court: It seems to me—

—Tr. Tr. 759—

Mr. Gladstein: But I haven't completed the grounds of my objection and I desire to continue.

The Court: Now perhaps you had better go on.

Mr. Gladstein: I think your Honor's determination is a little bit hasty because there are two other facts—

The Court: I see no merit in the challenge, none whatever.

Mr. Gladstein: Well, add to what I have said the juror's own statement that he has pending at the present time an application for employment with the Veterans Administration,—I think I have stated the record correctly? Now it is no secret to any of us that before a person can now obtain employment with any branch of the United States Government, certain procedures take place, certain processes. They are called, your Honor, loyalty; but what happens is that a person must make—

The Court: Now that I will not permit you to go on with, Mr. Gladstein.

Mr. Gladstein: But, your Honor—

The Court: That is not the basis of objections. You are going into a lot of this talk about what you say you know—

Mr. Gladstein: No.

The Court: —and so on, and I will not have it.

Mr. Gladstein: I am simply—

—Tr. Tr. 760—

The Court: That is all there is to it. This is a certain procedure that you are going to hold on and hold forth, and I will not hear it.

Colloquy

Mr. Gladstein: I am not going to do that; I am going to refer to the kind of procedure that is going—

The Court: Well, you have referred to it enough.

Mr. Gladstein: My point is that if a man has pending an application for employment with the Veterans Administration, and if, as is true, certain qualifying procedures have to take place; if, as it is true, he hopes to obtain that position, can it be doubted that a person is placed in an untenable position if he is at the same time required to sit in a case of this kind where the issues as they are, and at the same time ask that person not to feel the pressures that naturally exist in the light of his ambition to achieve a position with the Veterans Administration, a branch of the Government? That creates certain conflict of interests and gives rise to certain motivations and biases, which are perfectly natural, but the very fact that they exist requires that such a person not, in all fairness to himself as well as to the defendants—

The Court: Can you state the matter with less

—Tr. Tr. 761—

argument, Mr. Gladstein? Usually a statement of an objection can be made without so much argument.

Mr. Gladstein: Well, your Honor—

The Court: Is there some further point that you desire to make?

Mr. Gladstein: There is. Now there is a third aspect of the juror's testimony that I desire to call your Honor's attention to. Here again I am not intending to be personal at all but I ask your Honor to weigh the import of the fact, along with

the other two things that I have said, the juror is a member of a religious society—and there is no question of his right to belong to it, but—

The Court: If you think that disqualifies anybody in this court you are making a big mistake.

Mr. Gladstein: Your Honor's interruptions have made it impossible for me to say what I intend to say, that I do not question the right of a person to belong to any organization, be it religious or otherwise, and I do not say that that constitutes a basis for challenge, but if your Honor will permit me to finish. Now what I want to say is that a person who belongs to such an organization presumably supports its activities, and the organization that the juror belongs to happens to be engaged in activities that—

—Tr. Tr. 762—

The Court: Now I will not hear that, Mr. Gladstein. I have had enough here of these statements—

Mr. Gladstein: These are not religious activities I am talking about.

The Court: I am not going to have any more of it. The challenge is overruled.

Mr. Gladstein: I do make an offer of proof—

The Court: And you will desist from further argument.

Go ahead with your peremptory challenges.

Mr. Gladstein: Will the record show that I desire to make an offer of proof?

The Court: These fulminations here about statements of fact of one kind or another—

Mr. Gladstein: Your Honor—

Colloquy

The Court: —we are not going to have any more of this in this trial. You might just as well make up your mind as to this.

Mr. Gladstein: This is not a question of religious activity, your Honor, but a question of political activity.

The Court: Well, whatever it is, we are not going to do it on your sayso.

Mr. Gladstein: I got it out of that box.

The Court: We are going to take it from the

—Tr. Tr. 763—

jury box.

Mr. Gladstein: I ask your Honor to follow up that question.

The Court: I have asked all the questions that I intend to ask of these jurors on the voir dire, and you will now proceed with your peremptory challenge.

Mr. Gladstein: Very well. I take exception to your ruling.

. . . . . .

—Tr. Tr. 785—

. . . . . .

Mr. Sacher: In the meantime, your Honor—

The Court: Do you have more motions, Mr. Sacher?

Mr. Sacher: Is that sarcasm or an inquiry?

The Court: No, an inquiry.

Mr. Sacher: Just an inquiry.

The Court: I asked you if you have some more motions and you take offense at that question.

. . . . . .

Colloquy

—Tr. Tr. 828—

New York, March 16, 1949

Mr. Crockett: As your Honor will recall, I was excused from attendance upon the Court, and, as a result, I was not present on yesterday, at which time there was some discussion concerning a motion that had been addressed by me to the Court on Monday a week ago, March 7th, and what had transpired since that time with reference to that motion.

In reading over the record, I notice, or, rather, I got the impression that there were definite implications in some of the remarks by the prosecution to the effect that I had been guilty of some conduct unbecoming a lawyer.

It is the first time in my 15 years of practice that any such inference has been made. I have always tried to respect the Court, to treat opposing counsel with courtesy, and I expect similar treatment from opposing counsel. Therefore, whenever any such in-

—Tr. Tr. 829—

sinuation is made, I reserve the right, not only to express my resentment, but to explain to the Court, as best I can, exactly what happened.

The Court: Well, your conduct in this trial has not been irreproachable.

Mr. Crockett: Well, I might take exception to your Honor's remark in that respect, and I do take exception.

Mr. Gladstein: And I do too, not simply because the remarks were directed against Mr. Crockett, but I, as an attorney who has been sitting here partic-

ipating in this case from the outset, submit that the remarks of the Court, addressed to Mr. Crockett, concerning him, are absolutely impermissible, unwarranted, unjustified, and I take strong exception to that kind of remark.

The Court: Your conduct has been even worse, Mr. Gladstein.

Mr. Gladstein: And I object to that remark and take exception to it, although I must confess that I am not surprised to hear your Honor say that.

* * * * *

—Tr. Tr. 841—

Mr. McGohey: Now if your Honor please, I have not been personally involved in the controversy between Mr. Gordon of my staff and Mr. Crockett. Now if we are going to get into this as to who is in the corner, these observations by Mr. Crockett, then I shall have to insist on some kind of a hearing, but I agree with your Honor that it ought not to be done. As I view the case now, as I see the situation, it is this, that there was an affidavit given, that

—Tr. Tr. 842—

it was taken, that it wasn't returned. So much is agreed by both of us now. Now we are informed, and for the first time, by Mr. Crockett, that the affidavit which he admits he took from us on Friday is the same affidavit or the same papers which appear in a motion which was submitted yesterday afternoon by Mr. Sacher. Since Mr. Crockett says that those are the same sheets of paper that he took from us on Friday and that this constitutes a return of them, I will accept that, your Honor.

Mr. Sacher: I should say that I told Mr. McGohey yesterday that what he had was the paper that he was talking about.

Mr. McGohey: Now if your Honor please—

Mr. Sacher: Your Honor saw something sinister about that.

Mr. McGohey: May I please be permitted to finish my statement?

The Court: Yes. Mr. Sacher, please do not interrupt.

Mr. Sacher: Does Mr. McGohey have these prerogatives of making long arguments? You will hear argument from nobody except Mr. McGohey on what appears to be a triviality.

The Court: Mr. Sacher, please don't be offensive. When one lawyer arises to interrupt another it is

—Tr. Tr. 843—

something I do not like to see, and then when I suggest that you do not do it and you make another one of these comments, the plain import of which is that I give one treatment to the prosecution and a different treatment to the defense, I consider that offensive and not respectful to the Court, and so I ask you, please don't do that again. You may except to anything that I do. You may object to my conduct in any way, but these insinuations which attack my honor and my integrity are distasteful to me, are quite unnecessary and I wish you would please stop it.

Mr. Sacher: May I renounce any intention to attack the Court's honor or the Court's integrity.

The Court: Well, your language is singularly ill-chosen, then.

Colloquy

Mr. Sacher: Well, I notice that your Honor has enumerated two things: you said I may object and I may except, and I simply request of the Court the information as to whether that same rule will apply to the prosecution attorneys or whether they, in addition to those two things, may have extended argument and we be denied argument?

The Court: Well, it has happened too often, not only by one or another but many of defense counsel, these sly insinuations that I am giving one kind of

—Tr. Tr. 844—

treatment to the prosecution and a different kind of treatment to the defense, and that I am doing that in some sort of persistent fashion. I consider that a direct affront to my honor and integrity, and it is not to be tolerated that lawyers at the bar speak that way to the Court, particularly when there is absolutely no foundation for it.

Now I listen to argument when I think argument will help me, and when I feel that it will not then I ask lawyers to please not do it. I have done that on both sides. Naturally I have done it more often where the offense has been more frequent and where the occasion for the comment has been more frequent, but I can assure you that I have no idea at any time in this case of giving any different treatment or any different consideration to counsel for the defense than I do counsel for the Government.

Mr. Sacher: Well, I am happy to have that assurance from the Court.

* * * * *

Colloquy

—Tr. Tr. 1044—

New York, March 17, 1949

Mr. Sacher: If your Honor please, out of an abundance of caution, may I ask whether the disposition which your Honor has indicated in regard to the accrual of the benefit of objections made by one to all will apply—

The Court: Yes, at all times during the whole trial.

Mr. Sacher: I understand that, but that will apply also, I take it, to Mr. Dennis throughout the trial?

The Court: Oh, I think so. I see no reason why—I see reason why I should be all the more anxious to give him the benefit of it, and I do so, and I think that it is going to be very helpful here if, as we get ahead with this trial, you all bear in mind that an exception or an objection made is really for the benefit of all of those, so that this getting up, one after another, which I can understand sometimes a man feels he should do, may be avoided. I think you will find things will go so much smoother and to the

—Tr. Tr. 1045—

advantage of everybody concerned, including all the defendants, if you will avoid that, but I give no direction that you must not do that. I really desire to avoid directions of that kind throughout the trial. They are contrary to my way of doing, and I find that lawyers, with a little leeway, a little flexibility, are much more likely to go along smoothly than if you start giving all kinds of directions that circumscribe their way of speaking and so on.

Colloquy

—Tr. Tr. 1165—

New York, March 21, 1949

* * * * * *

Defendant Dennis: We will show with what peaceful intent we taught and advocated, amongst other things, to continue where I left off, to oppose American support to the unjust and criminal war against the Chinese people waged by the miserable Chang Kai Shek, to oppose the civil war against the Greeks, waged by the monarchist-fascist puppet of the American trusts, with the American people footing the bill, to oppose the Anglo-American oil lords against the new State of Israel, and the people of Indonesia, and to oppose the restoration of the German and Japanese monopolies and was potential under the new management of the American cartelists. And the defense will establish that we Communist leaders saw that American national security and universal peace were weakened and were not strengthened by the Truman doctrine and the Marshall Plan. We will show that we teach that the North Atlantic Pact, now being rushed to signature—

Mr. McGohey: If your Honor please, the North Atlantic Pact was only signed the other day. We are talking about something that happened in 1945.

The Court: I will not let that go on any more.

—Tr. Tr. 1166—

It is so plainly irrelevant. It is just using the courtroom for the purpose of propaganda; and I won't have it. Now please desist from any further opening or alleged opening along that line.

Colloquy

Defendant Dennis: I object to that statement, your Honor. Do I understand it is the ruling of the Court that I cannot offer proof of either my intent, what I have advocated, what I have taught, what I have done during the period covered by the indictment?

The Court: Well, those things that you just have been talking about there do not seem to me to be very relevant to the charge, whether you were conspiring—

Defendant Dennis: Those are the things, your Honor, that actually I and my co-defendants did and not this Goebbels-like charge contained in the indictment.

The Court: Well, you will kindly refrain from any further reference to Chang Kai Shek and the war in Spain and everything else under the sun. That seems to me to have nothing to do with the case. Try to get down to what you are charged with here.

Defendant Dennis: Your Honor, may I continue?

The Court: Yes, but please eliminate those things that I have just spoken of.

Defendant Dennis: At this time I would like to

—Tr. Tr. 1167—

establish further that in our work and efforts to secure a lasting peace for our people that we consider that World War III is not inevitable. May I deal with that?

The Court: What has World War III got to do with the case?

Defendant Dennis: It is very important for the American people, and it is what we have taught

and advocated in this period, your Honor, and I am very particular—

The Court: Well, I cannot see that World War III has anything to do with whether you were a party to this conspiracy or not. I suppose it is easy to get off everything else under the sun and maybe we will forget what the charge is, but I am not likely to do that.

Mr. Isserman: If the Court please, on behalf of my clients I object to your Honor's comments.

The Court: Yes, I know.

Defendant Dennis: To conclude on this point, then, your Honor, I and my co-defendants will show, we will show that we publicly advocated that all peace-loving Americans should unite that the Truman Administration enter into direct negotiations with the U. S. S. R. and respond in good faith to its repeated disarmament and other peace proposals.

—Tr. Tr. 1168—

The Court: I knew you were going to do that. You are going to be an awful problem to me, I can see that. I tell you to stop and you go right on. I suppose the best thing to do is to just take it cheerfully. Go ahead.

Defendant Dennis: We will show that we taught that Americans must take their choice between a pact with the Soviet Union or an aggressive alliance against our most powerful World War II Ally, and against other democratic people.

We Communist leaders will prove that in this we have acted with wilful intent to save our country from the devastation of bombing and invasion and our people from the horrors of another World War.

We will prove that we have attempted wilfully to realize what is popularly known as Roosevelt's great design for a lasting peace and hence with the purpose directly opposite to that alleged in the indictment.

The defense will show that we Communist leaders have taught that the American people should have confidence in their power and the power of the people to help prevent another World War and we have taught that for the first time in history the peace camp is stronger than the war camp and we have directed our efforts in favor of peace.

. . . . . .

—Tr. Tr. 1171—

The Court: Now, Mr. Dennis, that is the end, that is enough. You are not going to go on any more with that and you will kindly desist. I have tried to be just as patient as I could here and it is evident to me that, while you understand what I have told you, you are determined that you will go on and bring in all these irrelevant matters. So, I have no other alternative now than to tell you to desist.

Defendant Dennis: May I proceed to a different point, your Honor?

The Court: Well, I have had you purportedly go to a different point three or four times and it just seemed the same old—

Defendant Dennis: On the contrary, your Honor said that I might continue, and at various points I did continue. I now ask permission, if—I only yield—

The Court: As I said, you are going to be a terrible problem for me, I don't know what I am going

to do, because you just have it in your mind that you are going to go into wage increases, the Spanish War, the Chinese War, all these things under the sun, and I don't know, frankly, how I am going to stop you without taking some action that I don't want to take.

* * * * *

—Tr. Tr. 1173—

* * * * *

Defendant Dennis: And it is on the question of peace, on the question of defense of the Bill of Rights, and the question of the living standards of the people. These are the things.

The Court: You see, after I tell you to stop, you look me right in the eye and you say it all over again. Now, it may be that there will be no alternative other than to just let you go on talking and then I will do a little talking, and then we will dispose of it in the course of time. So you may go ahead now with just what you proposed to add and we will see what it is.

Defendant Dennis: May we have a recess, your Honor?

The Court: Well, you are going to have a recess in three minutes. Go right ahead to the next point, so you will get a little more of it done. Then you can continue after lunch.

Defendant Dennis: Under protest—

The Court: If you have forgotten your trend there and desire the adjournment to examine your notes, I will let you do that, and I hope you will take the advantage of the time to try to keep a little bit more to the point here this afternoon.

* * * * *

Colloquy

—Tr. Tr. 1300—

New York, March 22, 1949

Mr. Sacher: May it please the Court, I do think that your Honor has overstepped the bounds of propriety this afternoon. Coming as your remarks did after three openings each of which denied that the defendants or any of them had been guilty of the charge contained in the indictment, and bearing in mind that each of the counsel who spoke this morning as well as each of the counsel who spoke yesterday spoke on the facts and in support of that which he was going to prove, I submit that the only effect of your Honor's observations upon this jury could have been to negate each and every factual statement that was made.

—Tr. Tr. 1301—

The Court: That is a pretty broad statement.

Mr. Sacher: That is a broad statement but I would like to make it a little broader.

I have sat here and watched your Honor scratch his head and smile incredulously at statements made by counsel and resort to a number of things each of which must have had the effect on the jury of negating—

The Court: I may have scratched my head, I don't recall, but as far as the other things it is positively not so.

Mr. Sacher: It is very strange that on the occasions when you scratched your head and pulled your ear, we were speaking and not Mr. McGohey.

The Court: Maybe you were not watching me.

Mr. Sacher: I just want to say that your conduct at all times—you see, you are doing it again.

The Court: I know, you are going to say I am corrupt and I am disqualified. You called me all those things before. Now you can run the catalogue again and I will listen patiently. Make it just as bad as you can.

Mr. Sacher: Your Honor, I am certainly aware of the fact that if I bear false witness against your Honor in anything I have said that I am subject to disciplinary measures and I am not inviting disciplinary measures by making false statements.

—Tr. Tr. 1302—

The Court: You mean that I will take disciplinary measures against you because you said I scratched my head? Don't be absurd, Mr. Sacher. Don't be absurd.

Mr. Sacher: The point I am making is that in every available means your Honor is conveying to the jury your lack of sympathy if not hostility to the defendants, their counsel's presentation of the case, and in these circumstances I want certainly to note on behalf of my clients a vigorous objection to your Honor's conduct and I wish to join Mr. Gladstein in the motion to declare a mistrial by the withdrawal of a juror.

The Court: Motion denied.

Mr. Crockett: If the Court please, I submit that the statement of the Court given to the jury and considered in the context and the circumstances in which it was given, and the emphasis evident in the Court's tone of voice, and your Honor's facial

expressions, necessarily prejudiced the minds of the jury against my clients and makes it impossible for my clients to have a fair trial before an impartial jury as guaranteed to them in the Fourth and Fifth Amendment of the United States Constitution. Because of this I join in the motion made by Mr. Gladstein and adopted by Mr. Sacher to the effect that this Court declare a mistrial at this time.

The Court: I used no particular tone of voice

—Tr. Tr. 1303—

and no unusual facial expressions, and the motion is denied.

Mr. McGohey: May I be permitted to make an observation?

The Court: Yes, you may.

Mr. McGohey: I wish the record to show that I sitting at this first counsel table have been watching your Honor throughout the opening statements by counsel for the defendants and by the defendant Dennis himself, and on my Honor as a member of the bar of this court I have observed nothing that would indicate an opinion of the Court one way or the other, and certainly, in so far as objections which I made to statements which were made by counsel for the defense and by the defendant Dennis himself, I am certainly not satisfied that your Honor has been as accurate as I think you ought to have been. I thought you were more liberal than I thought the defense were entitled to for you to be. And I want the record to note that I deny any action, any facial expression, any tone of voice, any gesture on the part of the Court which could reasonably by any stretch of the imagination have been interpreted

to indicate a trend of mind by the Court one way or the other.

And furthermore, observing the jury I represent that in so far as I could understand and interpret

—Tr. Tr. 1304—

the expressions of the jury, nothing that the Court did had any effect upon the jury's thinking.

The Court: Now you have some motions to make.

Mr. Isserman: If the Court please, I have, and in connection with that motion I would like to present it to your Honor and present Mr. McGohey with a copy if I may (handing to Court and Mr. McGohey).

The Court: I want you gentlemen to understand that when I scratch my head I am just plain scratching my head. I don't intend to stop doing that because you made these statements here. I have a habit of doing that. I am not going to stop just because you make these remarks.

Mr. Isserman: If the Court please, this is a matter which has been before the Court before on several occasions, that is, at least informally before the Court in the course of an opening address by Mr. Dennis. I ask the Court notwithstanding that to give it complete and full consideration because of the gravity of the matters contained in it which, on the one hand, deal with the right of the defense to the full presentation of the evidence in their favor and, on the other, deal, whether we will it or not, with the health and welfare and life of the defendant William Z. Foster whose trial has been severed from this case.

This motion is a motion for this Court to recon-

—Tr. Tr.—1305—

sider the application made by the defendants heretofore to take the deposition of William Z. Foster under such circumstances as, one, will not interfere with the conduct of this trial and, two, that will not unduly jeopardize his health. We have specifically requested heretofore that that deposition be taken by way of written interrogatories and answers thereto as provided for in the rules of Civil Procedure that are applicable in this kind of case. There is a new fact in addition to the others which we urge, which we ask the Court to consider on this essential question, that the absence of Mr. Foster's testimony is of such nature and such character that it will result on behalf of these defendants, or is likely to result in a failure of justice. We have on previous occasions set forth in general the reasons why Mr. Foster's testimony was unique and special and important in this case. We have said, described that testimony necessarily, only in general, for two reasons. One was that the indictment is not specific. We have not gotten the particulars we asked for. And secondly, because there are matters in that testimony which appropriately should be made and stated only after the Government's case is in.

Now the new matter which we call especially to the Court's attention is contained in the affidavit of Carl Winter, which is next. And it refers to the

—Tr. Tr. 1306—

references made by Mr. McGohey in the opening statement in respect to Mr. Foster. Those are found on page 2.

The Court: Now just a second. Let me read that.

Colloquy

Mr. Isserman: Pages 2 and 3 of the affidavit.

The Court: Starting at the bottom of page 2?

Mr. Isserman: That is correct, your Honor.

The Court: Very well.

Mr. Isserman: There can no longer, your Honor, be any question about the materiality and relevancy of the testimony of Mr. Foster because we cannot let the opening statement stand where it is. It is merely an indication by the Government of what it intends to prove in this case. The numerous references to Mr. Foster as a leader and a chairman of the Communist Party are such that make it abundantly clear that his testimony is necessary, relevant and material to the issues in this case.

But more than that, the defendants, all of them, feel and their counsel feel that the absence of that testimony will result in a failure of justice.

Now I call to the Court's attention also the petition which Mr. Winter who made the affidavit has incorporated in his affidavit.

The Court: Yes, I just noticed that. I am not going to receive that. You know, the other day, one of

—Tr. Tr. 1307—

the defendants got up and said he had a petition which he said the other defendants signed but that they had not consulted with their lawyers about. I wasn't sufficiently advised at the time as to what the law was, so I took it and examined it. I have since examined the law and it is my interpretation of the decisions that when defendants are represented by counsel, and this is a joint petition signed by the defendants, that it is a matter within the discretion

of the Court as to whether or not it will be received, and in the exercise of that discretion I refuse to receive that petition. I will consider the motion, however.

Mr. Isserman: In connection with the motion the petition—

The Court: What did you need to have the petition by the defendants for? You have got the lawyers all here.

Mr. Isserman: Exactly. The point I make here is that the defendants out of the urgency of the case and out of their needs have felt the need of addressing your Honor in this way. The point I make is that the allegations of the petition and forgetting for a moment its form have been incorporated in the affidavit and there the fact is stated, which is important, that Mr. Foster is an eminent world authority—

—Tr. Tr. 1308—

The Court: Where does it say the petition is incorporated in the motion?

Mr. Isserman: That is found in paragraph 3 of the affidavit which says that the statement is attached and made part of the affidavit.

The Court: Wait till I find it.

3, you are talking about? Page 3?

Mr. Isserman: I am talking about paragraph 3, on the last page of the Winter affidavit. The mimeographed copy I have is a little blurred on the page number. Paragraph 3.

The Court: Well, you see, that is rather repetitive language. It is described as a joint statement

and petition and then you have this language: "Further indicated and supported by the joint statement and petition signed by each of the defendants herein, including myself, which said statement is attached hereto and made a part of this affidavit."

Of course, the petition is also attached.

Mr. Isserman: It is true, but the petition is not a fact; that is a form in which the statement is in. The statement contains the fact.

The Court: I don't consider that an appropriate way to present sworn evidence. The petition is unsworn. If you want to make a motion and have that

—Tr. Tr. 1309—

petition as part of it I will not consider it. You will have to take the papers back and reframe that.

Mr. Isserman: If your Honor please, I present the papers as they are and, if your Honor refuses to consider the matter in the petition even as to the factual allegations, I will take exception to that.

The Court: I will take the motion as made orally on the basis of the oral statements you have made as an official of this court and a member of the bar and I will consider in connection with that your argument thus made. I will give the matter reconsideration. In fact, I have given the matter reconsideration and the motion is denied and I pass back the written papers.

Mr. Isserman: Before your Honor rules, I did want to make another statement as an officer of this court which I take to be true and that is that Mr. Foster is an eminent world authority on Marxism-Leninism and as such has played a unique and funda-

mentally important part in the development of the Communist Party of the United States, and for that reason his testimony is essential, and I would like to make one more statement, your Honor, and that is this:—and this I know of my personal knowledge—

Mr. Foster is most anxious to be a witness in this case and is contemplating taking that step against the orders of his doctor, and he is contemplating

—Tr. Tr. 1310—

taking a step which I know from his doctors will jeopardize his life.

The Court: Then he better not do it.

Mr. Isserman: And therefore we ask the Court to consider very carefully his right to submit his testimony by deposition and again I say in a way that can be worked out which will not interfere with this trial or unduly jeopardize his health. The defendants believe and counsel believe—

The Court: Just let me say something. Mr. Isserman, I wrote my opinion in that matter last November anticipating that some such question might come up and somebody might say, "You are practically forcing him on in his ill condition." Nobody is forcing him. You had the chance since my opinion was handed down last November to take his deposition in the interval. My opinion practically invited you to do that in the interval between the time my opinion came down in November to January 17th, but you didn't decide to do it. If he decides to be a witness it will be nobody's fault but his own and that of various counsel for the defendants.

Colloquy

Mr. Isserman: If the Court please, there is one fact I would like to call to the Court's attention, and that is there is no way of taking the deposition of a defendant and Mr. Foster is a defendant and was

—Tr. Tr. 1311—

not severed until January 17th. And we ask the Court to consider this fact that it is entirely possible to take such a deposition and that the ends of justice would be served if it is taken, that the ends of justice require it, that this Court should desire that every fact, including Mr. Foster's participation in the acts covered by the indictment should be presented to the jury, and we ask the Court to consider very seriously the taking of his testimony in such a way that it will be before the jury and will not be of jeopardy to his health.

The Court: I have considered it. His deposition will not be taken.

Mr. Isserman: If your Honor please, I object to the ruling on the ground that the denial of the right to take his deposition is a denial of due process to the defendants.

The Court: Very well.

Defendant Dennis: May I be heard very briefly?

The Court: Yes, you may.

Mr. Dennis: With respect to the petition of the twelve defendants, it is unfortunate that your Honor has not seen fit to read it, let alone receive it. I want to state to the Court that we did not draw this up as a perfunctory matter.

—Tr. Tr. 1312—

We took this step because of the very profound and deep concern and conviction of all of us that it

is necessary to petition for a redress of a very deep injury and an injustice to each of the defendants individually and to all of us joined in the trial. In respect both to the petition, which speaks for itself, and to the motion submitted by Mr. Isserman, I think the Court should give further consideration to the fact that not only is this not an ordinary trial, an ordinary trial, but that Mr. Foster is not an ordinary man or an ordinary member of our party. He is the National Chairman of our party. He is one of the founders and a leader of our party since its existence. He is the foremost Marxist in these United States, and certainly he has played a key and a very central role in respect to all of the issues which are joined in this trial, and therefore we consider particularly, and in addition since Mr. Foster in effect is being tried in absentia, that to refuse to grant a deposition would deprive both myself and my co-defendants and Mr. Foster of due process of law of our most elementary constitutional rights. I think your Honor would grant that this would be a different situation, or certainly most people would, that it would be really unthinkable in these United

—Tr. Tr. 1313—

States if any other political party or any national organization were involved in any court case, no matter how petty, how minor, where the chairman or the president of that organization would be prohibited from being a witness, be it through oral testimony or through a deposition.

The Court: You say I have prohibited him from being a witness.

Colloquy

Defendant Dennis: In effect, and I will just conclude, your Honor, on this point.

The Court: Well I deny that; I haven't prohibited him at all.

Defendant Dennis: I wish to make it clear that I and my co-defendants consider that the testimony of Mr. Foster is so indispensable that at all costs in one way or another it must be presented and submitted to the jury, and therefore it seems to me that the Court is faced with a very grave and serious alternative, whether to grant the taking of deposition under expeditious conditions or to compel Mr. Foster to be a witness where his appearance in this court could only result in fatal consequences, and that is not just my personal opinion or of his personal physician; it is also the opinion, your Honor, of physicians appointed by the Court.

—Tr. Tr. 1314—

And I respectfully urge that your Honor reconsider the motion and give due and earnest consideration to the petition which we 11 defendants have submitted.

The Court: As to the petition, Mr. Dennis, is not particular important now, you didn't think I read it because it is hard for people to realize how experienced judges and lawyers can glance through papers readily, and I saw enough of it to see that it was on the same subject matter as the motion papers. That is not particularly important now. I made the ruling that I did about the petition because I wanted to serve notice on all the defendants here that if during the trial one or another of them got up and

began handing me petitions, that in all probabilities I would not receive them. I will exercise my discretion in every such instance, but I am not likely to receive it.

I don't see any use in that. If you have lawyers here, the lawyers can present the arguments in writing or otherwise; and if you have people represented by lawyers themselves continually offering petitions, next thing they will want to do is to make oral argument and we will have a lot of unnecessary confusion here.

As to the merits of the motion itself, I don't remember exactly how many times that motion has

—Tr. Tr. 1315—

been made. One might suppose, to listen here this afternoon, that it was the first time. But, oh no, that has been coming up again and again, and arguments have been made and I have listened to them, I have given the matter thought, and I gave it a lot of thought way back last November when I first heard that Mr. Foster was ill. And it isn't from any lack of consideration or any hasty action on my part, but the decision I made has been made after the most mature thought and consideration and deliberation on the matter.

And I am not going to have the deposition of Mr. Foster taken, nor do I consider myself to be in any such dilemma as Mr. Dennis has indicated.

Now, Mr. McCabe, have you something to add?

Mr. McCabe: Yes, your Honor. Of course, I suppose your Honor had in mind that Mr. Dennis, as

he was just addressing your Honor, was doing it also in the capacity as an attorney.

The Court: Yes.

Mr. McCabe: And I believe his name was signed to the motion.

The Court: If it had been a petition signed by him alone, why, I might have given some consideration to it. I suppose we will begin having those things in a little while. But don't forget that we had a long

—Tr. Tr. 1316—

talk in my chambers this afternoon, for ten or fifteen minutes, on this same subject and I stated I would deny the motion. And you went over the whole thing, backwards and forwards, and you come out here in open court and each one of you wants to have something to say all over again.

Mr. McCabe: I see, your Honor, the motion to reconsider repeated the motion which had heretofore been made on March 7, 1949, at the time I represented Mr. Dennis, and through an inadvertence, I suppose, contains my name as attorney for Eugene Dennis and Henry Winston. I think that is a detail—

The Court: You needn't worry about that.

Mr. McGohey: I would like to call your Honor's attention to the fact that this inadvertence must have occurred today because this paper that he is talking about is dated March 22. It is not a paper that is dated on March 7, before he was discharged as Mr. Dennis's counsel. It is today's date.

The Court: Even so, it is an inadvertence and of no moment.

Colloquy

Mr. McGohey: Like the citations, perhaps.

The Court: I don't think that it will ever be argued here that by such means Mr. McCabe has been re-

—Tr. Tr. 1317—

instated as Mr. Dennis's lawyer or anything of the kind.

I think it was an inadvertence, Mr. McGohey.

Mr. McCabe: As Mr. Foster's counsel, I recall your Honor's admonition, that your Honor has recalled on several occasions, of last November, stating that if we wished to take the deposition of Mr. Foster we should take some steps in that direction. Let me say that, apart from Mr. Dennis's position as a defendant at that time, that I, as his counsel, would have been at loss then to formulate depositions or interrogatories in the light of the information which we then had.

The Court: You mean, after Mr. McGohey's opening to the jury, now you know all the things you would have asked about?

Mr. McCabe: No, no. No, as I say, the information contained in the bill of indictment might have permitted some general questions which inevitably would have brought in matter which was irrelevant, which inevitably would, in the light of the testimony adduced by the Government, have to be repeated or revised or amplified.

Now, testimony on the part of a defendant is given, normally, certainly, universally, in reply to testimony given by the Government, given by the

—Tr. Tr. 1318—

prosecutor. What were we to do then? Were we to

explore every possible bit of testimony which we could conceive of the Government's introducing and answer that?

Your Honor denied our request for a bill of particulars on Mr. McGohey's highest protestations that we were demanding his evidence—we were asking for his evidence. Your Honor said, "No, that wasn't right." Well now—

The Court: What I really said was that Judge Hulbert had already denied the motion and I was going to follow his lead.

You know, you, Mr. McCabe, you and your colleagues, you make a motion once and it is denied. And then you make it again just as though you had never made it before. Then if it is denied again, the next time it comes up, you all look up as though you had never heard anything about it before. When a motion is made and considered and denied, that usually disposes of the matter.

Mr. McCabe: Except this, your Honor, that as the situation develops, it happens that the motion becomes more and more appropriate. I anticipate renewing this motion, if your Honor denies it this time, I anticipate renewing it after certain of the Government's testimony or after all the Government's testimony because, were we to put in writing

—Tr. Tr. 1319—

now all the testimony which Mr. Foster would give, obviously we would be doing just what Judge Hulbert, and in the position which your Honor adopted, said would be giving us the Government's case, we would be giving the Government every possible bit

of information which we have. And certainly your Honor will agree that the Government is not entitled to know in advance every jot and tittle of our defense.

The Court: Who said they were?

Mr. McCabe: Well, I say, compelling us to take the deposition of Mr. Foster, had we started out as was implicit in your Honor's instructions to take deposition of Mr. Foster last November, we would have had to cover the entire field of his knowledge and his acts, and the Government was certainly not entitled to have that prior to the preparation and presentation of this case.

I submit that justice will require that Mr. Foster's evidence, testimony, be got before this jury. The jury is entitled to have that testimony. It would be asking a jury to decide upon less than all of the available testimony, if they walk out of this box finally without having heard the testimony of a man whose actions, whose name will loom large in the Government's case.

—Tr. Tr. 1320—

The Court: If that is another motion, it is denied.

Is there anyone else to add something?

Mr. McGohey: If the Court please.

The Court: Yes.

Mr. McGohey: It was Mr. Dennis, I think, who made the observation, made the statement that Foster was being tried in absentia.

The Court: Oh, yes.

Mr. McGohey: Now, of course, we all know that Mr. Foster is not being tried at all. This indictment

has been severed as to him and nobody is prohibiting Mr. Foster or anybody else from being a witness, if the defense want to call them.

This is not the first case, of course—it seems carrying coals to Newcastle, certainly, to be talking about practice to your Honor who taught it for so many years—certainly this is not the first case in which a deposition has had to be taken and, of course, it is always usual, when you know in advance that a witness may not be available, to take his deposition.

It was represented to the Court that Foster's health was such that he might not live long enough to be available, and that has happened before. And it happens so many, many times that some witness

—Tr. Tr. 1321—

that somebody would like to have offered in a case is unable to be there, and if it happens at a time when his deposition cannot be taken, well, it is just too bad. But this is certainly something that has happened many, many times in litigation, and I urge your Honor—I think your Honor has denied the motion?

The Court: Yes.

Let me clear up this business about Mr. Foster being tried in absentia.

Defendant Dennis: May I say—

The Court: I should have disregarded that statement, if it had not been made two or three times before but, as Mr. McGohey said, Mr. Foster is now not being tried at all, he is not being tried in absentia or in any other way, and I should suppose

that that was sufficiently obvious to require no further comment.

Yes, Mr. Dennis?

Defendant Dennis: May I make a brief rejoinder to the remarks of the District Attorney?

The Court: Yes, you may. There isn't anything up for determination but the jury is gone, and I think this is a good time to do it.

Defendant Dennis: Formally, juridically speaking, Mr. Foster is not on trial but, in effect, de facto he is being tried in absentia. Formally, juridically,

—Tr. Tr. 1322—

there are 11 individuals who are now on trial, but in effect de facto the Communist Party is on trial.

The Court: Well, that I cannot agree with. If there is any conviction here, why, then it will be plain, I think, that those who are not being tried are going to be in a different position than those who are being tried, and there is no use in keeping on talking that it is the Communist Party on trial when I have stated, again and again, to the jury and otherwise, that the only persons on trial are these 11 individuals, not including Mr. Foster. Now, of course, I cannot stop people from getting up and telling me just the opposite, and I suppose that is just one of those things you have to bear with, but the fact is as I have just stated.

Now, I think we had better adjourn.

Mr. Gladstein: May I say one word?

The Court: Yes.

Mr. Gladstein: A little bit more than one word because one—

The Court: You did not mean literally one word.

Mr. Gladstein: The first thing I want to suggest, your Honor, is this: I am a little bewildered by the speed with which, on passing on our motions, you pass from the future tense to the past perfect tense —Tr. Tr. 1323— and to the present. A little while ago, in passing—

The Court: Which one?

Mr. Gladstein: —in passing on the motion, here is what you did: you said, "I will reconsider the motion. I have reconsidered the motion. The motion is denied."

The Court: That is just what happened.

Mr. Gladstein: It is exactly what happened, and it happened just that fast.

Your Honor must recall this: we are presenting this petition today, this application, this motion, however it is to be denominated, under circumstances which are different from any which have heretofore obtained.

The Court: That I deny.

Mr. Gladstein: It may be so, you may deny it, but the record is there, and one of the things—yes, the record is the one the transcriber has and that includes many mentions on the part of Mr. McGohey in his opening statement to the jury of the involvement of William Z. Foster in this case as a defendant.

Now, what was it Mr. McGohey said? For example, and you will find this in the transcript, whether your Honor denies it or not, Mr. McGohey said—

Colloquy

The Court: I don't think that I intended to deny certain statements appearing in the transcript. What

—Tr. Tr. 1324—

I intended to say, when I said I denied that, was that there have been lots of other cases similar to this. This is not the first time some man became ill and a case was severed. I have had many such experiences right in my own practice.

Mr. Gladstein: I am not talking about other cases, and I want to talk about this one.

The Court: All right.

Mr. Gladstein: And I don't know what happened in the other cases after the opening statement, but I do know what happened in this case. Mr. McGohey said the defendants in this case, the 11 defendants, conspired with William Z. Foster as alleged in the indictment. That is the record. He said that William Z. Foster is a defendant to the indictment on trial but his trial has been severed, but he is a defendant; he said William Z. Foster was present at the Convention which allegedly dissolved the Communist Party in 1944 and created the Communist Political Association; was named to the National Committee and so forth and so on. At that time, as Mr. McGohey said to the jury, apparently he intended to introduce evidence on it, William Z. Foster did not object to certain remarks which are supposed to have been made by Earl Browder. This is in the opening statement of Mr. McGohey. Mr. McGohey goes ahead

—Tr. Tr. 1325—

and he says, William Z. Foster, the defendant, was

elected head of the Communist Party in July 1945, when the party was allegedly—.

The Court: I am just scratching my head now. Do not pick me up on that, for goodness sake.

Mr. Gladstein: Well, your Honor, I would—

The Court: That is what happened before and you said it was very significant and I just—.

Mr. Gladstein: I did not say it was significant, but I hope some day it becomes as significant as my father's used to be because, when he scratched his head, he was doing some thinking and he usually came out with something very good.

The Court: I seldom do it, but once in a while.

Mr. Gladstein: I will wait and the first time you do, your Honor, I will get up and congratulate you for the result of the scratching.

The Court: I hope you do.

Mr. Gladstein: However, then it is charged—it is said by Mr. McGohey in the statement to the jury that on a certain date Mr. William Z. Foster accepted the view—accepted the view—of Jacques Duclos, leader of the Communist Party of France. This is even more—this is more than anything that has possibly been indicated to us at any time hereto-

—Tr. Tr. 1326—

fore as to the possible involvement of William Z. Foster because now Mr. McGohey is telling the jury that he is going to prove that Mr. Foster personally accepted a certain viewpoint.

Now, isn't it important for us to have the right, not just for Mr. Foster to have the right, but for all

of us, I for my clients, to have the right to challenge that statement as to whether Foster accepted somebody else's views? And elsewhere there was even talk by Mr. McGohey about—I read the record last night—about compliance—compliance, he said; obedience and compliance with somebody else's views.

Now, Judge, you cannot overlook for one second the insidious purpose of that kind of statement to the jury, and it is this: it is to try to get across by innuendo to that jury the idea that the mystery man who isn't here, William Z. Foster, and these 11 defendants who are here, were taking some kind of orders from somewhere else, something that they are not charged with, but that is what Mr. McGohey was, in effect, trying to cultivate in the minds of the jury.

Now, the least we are entitled to, apart from a direction to the jury to disregard that kind of—

The Court: You really improvise, Mr. Gladstein. You start with one thing and then you—

Mr. Gladstein: Foster is the only man who, in

—Tr. Tr. 1327—

the nature of things, because of the manner in which Mr. McGohey formulated that assertion, can deny the false character of that statement, because only Foster can state whether he did or did not accept somebody else's [illegible] view. Now, that is just one example, that is just one example, but that example alone should illustrate the importance to due process for these defendants, and your Honor has said many, many times how concerned you are to see that the defendants get a fair trial.

The Court: Well, I am too.

Mr. Gladstein: Then I trust that your Honor's concern will lead the Court to grant that which is not unusual, and nothing unorthodox about it, and which we request, namely, that a person who is ill, a person who has been stricken so that he unfortunately cannot be here to personally defend his life and his activities, will at least have the right to have his words brought from his sickbed to the jury, so they can know what the truth is. There is nothing unusual about that request and we make it, and we ask the Court to really give some consideration to it.

The Court: You know, that word "really," there, that is the way you do. You put that little sly insinuation in, as much as to say that heretofore I haven't really given the matter any consideration.

—Tr. Tr. 1328—

Mr. Gladstein: What does your Honor expect me to think when, for example, you announce, "I will give this consideration, I have given it consideration, and I now deny it"? You say that so fast.

The Court: If you think that you were going to get me to forget what I was going to say by your going on, you are mistaken, because I can remember what I was going to say, and it is that, making insinuations like that is not proper or fitting, and it is not a worthy thing for you to do. Now, you do it all the time, and perhaps you take advantage of the fact that I don't take any stringent steps about it, but I hope you won't continue that sort of thing.

Colloquy

Mr. Gladstein: I meant no offense by that and what I really meant was that the Court should reconsider this application in the light of what I have said, in the light of the new developments since yesterday.

Mr. Sacher: Will your Honor indulge me just a moment?

The Court: Yes.

Mr. Sacher: It seems to me, Judge, that even if this were a most ordinary criminal case that in a trial which putatively, at least, is an inquiry into the truth and the whole truth, there ought not only to be no reluctance, but there ought to be eagerness

—Tr. Tr. 1329—

on the part of, not only the Court, but of the prosecution as well, to receive the testimony of one of the persons charged with being a member of an alleged conspiracy.

Now what is it we are talking about—

The Court: We are talking about taking Foster's deposition.

Mr. Sacher: There is the first point I am getting at, your Honor, that what we are essentially discussing is the question as to whether the jury shall have the benefit of all of the facts in the case. Now I ask your Honor, can you conceive that an instruction by your Honor that the jury is to draw no unfavorable inference from the failure of Mr. Foster to testify can possibly take the place of a deposition by Mr. Foster? That cannot certainly take the place because all you are doing then, if you did that, and as I believe you will agree with me, you would be

obliged to make that statement—all that your Honor would be doing would be to say, you cannot punish these people for not having Mr. Foster's testimony, but by the same token you haven't given either the defendants or Mr. Foster the opportunity to lay before the jury the facts in the case, and it seems to me that all the fine talking we may do about American traditions and American notions of fair play I think will be belied if despite the innumerable efforts by the defense the prosecution opposes and the

—Tr. Tr. 1330—.

Court denies applications to have Mr. Foster's testimony. In that connection I would like to make the following observation also, that no matter how often your Honor may say that all that is involved here is the trial of 11 defendants, the fact of the matter is that this indictment specifically charges the Communist Party with being the teacher and advocate of certain doctrines alleged to be proscribed by the statute, and what is more, the so-called criminality of the defendants or the alleged violation of law is purely derivative, derivative from the fact that it is alleged they conspired—

The Court: You see, Mr. Sacher, it is katy did and katy didn't. You keep saying "katy did" and I keep saying "katy didn't," and you keep that up, and the funny part of it is you don't seem to realize that I always have the last say.

Mr. Sacher: I realize that.

The Court: Now I am the one who is deciding this thing here. You and your colleagues think that when

you talk it is a voice from Heaven, because the lawyers say so. This is the first time I ever heard of such a doctrine, and what I decide can be reviewed, but lawyers talk, insisting on this and that and the other thing, as you do here, it proves nothing.

—Tr. Tr. 1331—

Mr. Sacher: Your Honor, I am simply—I am not trying to prove anything right now. I am inviting—

The Court: But you bring the subject each time as though we have never heard of it before, and as I am saying, it is like Katy did and Katy didn't, and then we keep it up, and then let it go by, to be resumed at a later time.

Mr. Sacher: But it seems to me that as the case has progressed it has reached a point since Mr. McGohey's opening of yesterday which indicates how flagrantly unjust it must be, first to the defendants on trial, because that is the primary consideration for everybody involved in the trial, to deny them the benefit and the assistance of testimony by the man who was basically the architect of the change that is complained of by the prosecution. And, secondly, it seems to me in the interests of ascertaining the truth and the whole truth it is absolutely essential—

Mr. McGohey: Will your Honor please excuse me? I have to get to the doctor with an infected gum.

The Court: Yes, you may go.

Mr. McGohey: I am sorry.

(Mr. McGohey left the courtroom.)

Mr. Sacher: It is absolutely essential as a matter of, well—what shall I say? —decency to Mr. Foster,

—Tr. Tr. 1332—

decency to permit a man who occupies the position, the status and the role in the life of this Party to give his testimony. Now it is not a question of reducing this thing to this amusing little that your Honor speaks of, of Katy did and Katy didn't. It seems to me rather that what we are speaking of is something that constitutes—

The Court: Well, the context in which I made that is not what you are now talking about but what you were talking about a few minutes ago, namely, that you insisted that others were on trial than these eleven defendants; that you have kept asserting, your colleagues have kept asserting, and I have asserted on the contrary that the only persons on trial are these eleven individuals, and that is what I said the Katy did and Katy didn't about. So don't transfer that to some other subject and go on in that way.

Mr. Sacher: Now I am encouraged to believe, your Honor, that in the light of these new considerations, that is, the new considerations being the developments coming out of Mr. McGohey's opening, that it would be nothing more than fitting and proper for your Honor to give this matter further consideration and to weigh the justice of the matter and to give us the benefit of your deliberations, perhaps at a time when you are not as agitated as you

—Tr. Tr. 1333—

are now.

The Court: I am not a bit agitated. Now Mr. Sacher, what is the use of making ridiculous remarks like that? You tried to make it look like when I am

scratching my head I am signaling to the jury, and now I am in a most agitated way, and I never was in a more gentle mood than I am this minute.

Mr. Sacher: Then I request your Honor to reconsider the matter and grant the application.

Mr. Gordon: May I be heard briefly, your Honor?

The Court: I think, Mr. Gordon, if you will just resume your seat I will dispose of the matter—unless there is something important that you want to add.

Mr. Gordon: Just to urge, your Honor, that the motion does not show the legal requirement that this testimony is exclusive and necessary. There has been a lot of talk but no motion, really, claiming the vital necessity of this testimony, and for that reason we urge that if your Honor does reconsider it, that you again deny the motion.

Mr. Isserman: If the Court please—

The Court: I knew that, Mr. Gordon.

Mr. Crockett: I can assure the Court it is not merely because Mr. Gordon has just resumed his

—Tr. Tr. 1334—

seat that I want to be heard, but Mr. Gordon makes the point that the motion does not meet the legal requirements. As I read the Federal Rules of Criminal Procedure, there are two requirements, neither of which requires that there be a showing that the testimony is exclusive to the particular witness. There is a requirement that the testimony be material, that is one, and, two, that it be necessary to prevent a failure of justice.

Colloquy

In the preparation of the former motion papers, which your Honor has seen fit not to receive, particular attention was paid to satisfying those two requirements. Those popers, I respectfully submit, are in proper order. The affidavit attached thereto was an affidavit of my client. It was incorporated in the motion, and therefore becomes a part of the motion. The so-called statement or petition which was attached to the affidavit was incorporated in the affidavit, was also signed by my client, and therefore becomes a part of the motion.

I submit that the Court should really receive that former motion. Before continuing on with what I have to say, however, in order to be technically in order on the record, I should like to move now for a reconsideration of the motion to permit us to take the deposition of Foster. In that connection I want to point out just one thing: the Court has mentioned

—Tr. Tr. 1335—

on several occasions, and Mr. McGohey has mentioned at least here today, that there seemingly has been some unseemly delay on our part in applying for permission to take this deposition. Your Honor is aware, I am sure, that in criminal cases the rule regarding depositions is slightly different than from what it is in civil cases. In civil cases no previous application to the Court, no formal order by the Court is necessary to take a deposition. In a criminal case we would, of course, be out of order if we proceeded to take the deposition of Mr. Foster without first getting an order from your Honor permitting us to take it and requiring Mr. Foster to give us that testimony.

Colloquy

Now the point that I wish to emphasize is this: Up until January 17th of this year, and certainly at the time that your Honor's opinion came down—the opinion to which you recently referred—

The Court: Yes; that was in November.

Mr. Crockett: Yes; Mr. Foster was a defendant in this case, and under the Federal Constitution not even this Court could compel Mr. Foster to give us any testimony by deposition or otherwise.

Mr. Gordon: You still cannot, your Honor. He is still a defendant. This is just talk.

Mr. Crockett: It was not until after the Court

—Tr. Tr. 1336—

entered the order severing Mr. Foster so far as the trial of this case is concerned, that it became possible, legally possible for your Honor to grant us permission to take his deposition.

The Court: How is it possible now? He hasn't said anything, has he?

Mr. Crockett: It is possible if we can get the order from your Honor. Now if Mr. Foster refuses to give us testimony—and I have no reason to assume that he wouldn't; on the contrary, I am sure he will be glad to do so.

The Court: Why should I assume that he would have objected in November? The natural assumption is that he would do everything he could to help the other defendants; isn't that so?

Mr. Crockett: That is exactly so, and so much so that I do not see why the Court does not grant us permission to take his deposition.

The Court: Well,—

Colloquy

Mr. Crockett: Let me make my second point, if I may.

The Court: All right.

Mr. Crockett: There are two points. In the first instance, you decide whether you are going to allow us to take the deposition. That doesn't necessarily

—Tr. Tr. 1337—

place Mr. Foster's deposition before the jury. You still have an opportunity at the time we offer to read that deposition to the jury to decide then whether or not Mr. Foster's testimony should be presented to the jury.

The Court: Now Mr. Crockett, I am not going to direct the deposition of Mr. Foster to be taken, and go on here, after being represented to me in the conference in chambers to let the jury go because it will just take a minute or two in here. We have been three-quarters of an hour on it. Now I tell you I am not going to direct his deposition to be taken.

Mr. Crockett: I don't recall telling your Honor that it will take only a few minutes. On the contrary my understanding was that your Honor indicated even before the motion was made to us in chambers that we would be permitted to make the motion but that you would deny it.

The Court: That is right. That is just what I said.

Mr. Crockett: But you also indicated that there have been occasions when you changed your mind even within a short period of time.

The Court: Yes, that is right, and the more you argue the more determined I am that I am not going

to permit the deposition to be taken, so this is one time that in a short time I did not change my mind.

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—Tr. Tr. 1358—

New York, March 23, 1949

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The Court: Now you know I have reasonable intelligence and when you make an objection once and you make it twice and you make it three times I may be assumed to understand the first time. Now when you object and you are overruled, you have an exception, as you understand, and I don't think you need to go into those long discussions on it—it wasn't very long, really, but I understood your point the first time and I make the same ruling.

Mr. Isserman: But, your Honor, my first objection was to the question. Now I move to strike out the answer which clearly indicates no relevancy at all, so I am really making a different motion at this time. I feel I must make it to defend my clients.

—Tr. Tr. 1359—

The Court: If it is a different application, I will deny the motion.

Mr. Sacher: Will your Honor be kind enough to state for the record that in the course of the trial the benefit of objections and exceptions made by any individual counsel on behalf of his clients will accrue to all of the defendants?

The Court: Yes. I have already said that several times and I repeat it now: any objection made or

any exception noted will inure to the benefit of all of the defendants unless the counsel for some particular defendant states on the record that he does not wish to take advantage of the exception or objection so that it may thus be entirely unnecessary for the counsel for the various defendants to get up and say that they also join in the objection.

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—Tr. Tr. 1372—

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Mr. Sacher: I object to that as leading and suggestive to the witness, obviously so.

The Court: Well, I tried to indicate a little while ago that as to some matters I will permit leading questions. It seems to me fairly obvious that that is what the witness meant.

Mr. Sacher: I don't know that anything can be taken for granted as obvious with this witness.

Mr. McGohey: I move that that remark be stricken out.

Mr. Sacher: Your Honor, this man, Mr. Gordon, just turned around and pointed his finger at me and said, "Sit down." I want to call that to the Court's attention. I will not permit myself to be terrorized by counsel for the Government.

—Tr. Tr. 1373—

The Court: I see you are returning to your old role.

Mr. Sacher: I object to your Honor's remark and I ask your Honor to instruct the jury to disregard your statement.

The Court: Mr. Sacher, I dislike shouting and disorder and I will not tolerate it. I don't know what little passage may have occurred between counsel here but there is no conceivable justification for your carrying on this way.

Mr. Sacher: Your Honor, Mr. Gordon turned around and he faced me and waved his finger at me and said "Sit down."

Mr. Gordon: That is not so.

Defendant Gates: Your a liar.

The Court: You have waved your finger at me and that doesn't bother me. I don't see why you get so excited.

Mr. Sacher: Well, your Honor—

The Court: Let's let these little incidents evaporate and not occur any more.

Mr. Sacher: May I respectfully ask that you tell the Government to desist from facing defendants' counsel. Their back is supposed to be turned to me and I prefer to see that part of them.

—Tr. Tr. 1374—

The Court: You see how one thing may lead to another without profit to anyone. We get into a dispute as to whether something was said or whether it was not. I think the wiser course to pursue is let's forget it.

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—Tr. Tr. 1505—

New York, March 24, 1949

* * * * *

Mr. Crockett: If the Court please, I object on behalf of my client to the admission of this document

in evidence for the reason that it is apparent, from the face of the document, that it is remote; it is not relevant or material to any issue covered by this indictment, or for the period covered by this indictment. I object further because there is no proof that this document was issued by the authority of the

—Tr. Tr. 1506—

National Convention of the Communist Party in 1945 or since 1945 and, therefore, its admissibility in evidence will constitute a denial of due process to my client under the Fifth Amendment of the United States Constitution.

The Court: Overruled.

Mr. Isserman: If the Court please, I object to the admission of this pamphlet of some 125 pages on the ground that its contents in no wise support the charge in the indictment that the defendants between the period 1945 and 1948 conspired to advocate the overthrow of the Government of the United States by force and violence; on the further ground that the use of this document under the circumstances indicated by the witness is protected by the First Amendment to the United States Constitution, and to receive it in evidence is a denial of due process of law and a violation of the Fifth Amendment; on the further ground that the document is remote, not relevant and not material to any issue in the indictment, which covers only the period from 1945 to 1948, and on the final ground that there is no proof before this Court that the document was issued by the authority of the National Convention

of the Communist Party in 1945, or by any subsequent convention or by the regularly constituted

—Tr. Tr. 1507—

leadership of that Party as provided for in Article 14 of the constitution of that party, referred to in paragraph 6 of the indictment, and which article we hereby offer to prove, nor was the document issued by the authority of any defendant—

The Court: Now, Mr. Isserman, with another couple of days of this type of objection I am going to have to rule the way I did earlier in this case, that counsel shall restrict themselves to the objection. Now I do not want to do that but I notice that this so-called statement of objections gets longer and longer and is not in accordance with the traditional way of doing these things. I don't intend to have the greater part of each court session taken up with these long-winded objections, especially when they are largely repetitious. Now I just want to indicate that you can do it and your colleagues can do it in very much the same fashion and protect all the rights of your clients in doing it.

Mr. Isserman: Now if the Court please, I was about to finish by saying, nor was it issued by the authority of any defendant during the period from 1945 to 1948, and I would like to respectfully object to your Honor's characterization of my statement of the objection on the ground that under the authorities it is not only necessary to object but to state the

—Tr. Tr. 1508—

grounds of objection with particularity. This docu-

ment was not offered before, and I stated the grounds as I conceive them to be under the law. I have made no argument in respect to it.

The Court: Overruled. This is being received only against the defendant Stachel.

Mr. Crockett: If the Court please, I would like the record to indicate my objections to the Court's use of the word "against."

The Court: What word?

Mr. Crockett: The word "against." Yesterday your Honor used that word. The mere fact that this witness is testifying does not mean that he is testifying against.

The Court: What word do you think I should use instead of "against"? "In favor"?

Mr. Crockett: I don't think your Honor should pass prejudgment that this evidence is against my client.

The Court: It is offered against him and it is being received against him.

Mr. Crockett: I want the record to note my objection.

The Court: Certainly the Government isn't introducing it against the Government. I never heard of such quibbling.

(Government's Exhibit 4 for identification received in evidence.) —Tr. Tr. 1509—

Mr. Isserman: May I have the number of the exhibit?

Mr. McGohey: Exhibit 4.

Budenz—Direct
Colloquy

Q. Mr. Budenz, did you use this document, Government's Exhibit 4—

Mr. Gladstein: Object to that as immaterial.

The Court: You may continue, Mr. McGohey.

Mr. McGohey: May I finish my question, if your Honor please?

The Court: You may finish your question, yes.

Q. —in connection with your work on the Daily Worker during the period that you worked on that paper as you have testified? A. Yes, sir, during the entire period.

Q. During the entire period? A. Yes.

The Court: Do you object?

Mr. Gladstein: I object to it as immaterial and a conclusion, not within the issues of this case.

The Court: Overruled.

Q. And did use it particularly between the period from April of 1945 up until the time that you left the Daily Worker?

Mr. Gladstein: Now I object to this as very leading and suggestive.

Mr. McGohey: May I ask leave to at least finish

—Tr. Tr. 1510—

the question before the objection is made?

The Court: Yes, yes, I think, Mr. Gladstein, in your zeal to object you might wait until the question is formulated.

Mr. Gladstein: I have no zeal to object. I just think when the United States Attorney offers a question that is leading and suggestive, it is my job to get up and call it to the Court's attention. Now this is a witness who answers quickly—

The Court: You know, Mr. Gladstein, when you interrupt your adversary continuously in the middle of a question it is disconcerting, it isn't helpful, and it is a form of disorder in the courtroom. Now I want you to stop it.

Mr. Gladstein: I have no intention of being disorderly.

The Court: Then stop it.

Mr. Gladstein: May I make my objection or—

The Court: You wait until the question is formulated. Then you may make your objection.

* * * * *

—Tr. Tr. 1572—

The Court: Let me get that name straight. There was this meeting of the National Committee of the Communist Party in January?

The Witness: That is correct.

The Court: Now, you have been talking about a later meeting at which you were not present.

The Witness: Within a month, yes, sir.

The Court: And that apparently is some new kind of committee?

The Witness: No, that is the same—it was a hastily gathered together same committee.

The Court: Without going into whether it was hastily got together, it was the same National Committee of the Communist Party?

The Witness: In part.

The Court: Or was it a new committee?

The Witness: There were some National Committee members there and some who were not Na-

—Tr. Tr. 1573—

tional Committee members, I was told.

Mr. Crockett: I object and move to strike it out. The witness has already testified he was not present, so how can he know and now testify as to who was present?

The Court: I want to know simply what he is talking about. I am not trying to find out who was present.

Mr. Crocket: Well, your Honor, in effect, what you are doing is having the witness testify. That is the only way you can find out what he is talking about.

The Court: It seems to me he is about to tell us what Mr. Davis told him about this meeting, and all I am trying to do is find out what meeting he is talking about but, as you object to it, I will drop the subject and let the thing be pursued by Mr. Gordon.

Mr. Gladstein: Since Mr. Gordon is taking a moment before commencing his pursuit again, I would like to object to this on the grounds that it is hearsay and no foundation has been laid, in so far as my clients are concerned.

The Court: You know, Mr. Gladstein, with all these objections, such an atmosphere of confusion seems to be arising here that you cannot keep head or tail of anything in your mind. Now I just want

—Tr., Tr. 1574—

to mention that, and pretty soon I am going to have to do something about it. You cannot follow the testimony with any continuity because there is all this wrangling and discussion over points that seem to me, like this Williamson one, matters of absolute triviality, and I hope that you will just try to refrain a little bit so I can follow the proof.

Mr. Gladstein: Your Honor, I think I am entitled to a ruling on this. I urge an objection upon the ground that, from the testimony so far given by the witness, what is now sought to be elicited would be hearsay as regards my clients, and I take it from the rulings that the Court has made heretofore that my objection is well grounded.

The Court: Well, I am receiving this preliminary material only against the individual who was present or who made the various statements from time to time.

Mr. Gladstein: That is the point of my objection.

The Court: That is my ruling as at the present time.

Mr. Gladstein: That is the point of my objection, and I had not heard your Honor make a ruling.

The Court: Well, I do make that now. I make it now.

Mr. Isserman: If the Court please, I would like

—Tr. Tr. 1575—

to object to your Honor's characterization of the conduct of counsel in respect to objections as being an undue interference with the right and necessity of counsel to represent their clients in court and as

tending to prejudice the proper actions of counsel before the jury.

The Court: Well, I find it most confusing. I can hardly follow the proof, there is so much objecting here on these preliminary things, and some of it, as I said before, on what I consider to be utter trivialities—this repeated objection by Mr. Crockett on the ground that proof was admitted against his client, which obviously it was, and that is done all the time.

Mr. Crockett: If your Honor please—

The Court: You want to talk some more, Mr. Crockett?

Mr. Crockett: Your Honor will recall I asked for a continuing objection so I wouldn't have to disturb your Honor by objecting each time.

The Court: And it isn't the disturbing, Mr. Crockett; it is the utter triviality of the objection that I am commenting on.

Mr. Crockett: On that point I will have to differ with your Honor; and since I am the one who has the responsibility of representing my client, I think I have a right to get up and voice objection whenever

—Tr. Tr. 1576—

one should be made.

The Court: But you get up pretty often. You probably will continue. I am just suggesting that, if possible, counsel could limit the number and character of these objections so that we can listen to the proof and keep our minds on what is going on.

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—Tr. Tr. 1583—

Mr. Gordon: I offer it in evidence.

(Mr. Gordon hands to Mr. Sacher.)

Mr. Gordon: I note that Mr. Sacher has a copy—

Mr. Sacher: Just a minute.

Mr. Gordon: —has a copy of that exact exhibit on the table in front of him.

Mr. Sacher: Now if your Honor please, you will observe that I have to build things around here so that counsel for the Government won't observe so

—Tr. Tr. 1584—

much as to what is transpiring on my desk. Now this is an acknowledgement by him that we are under sort of surveillance. Now may we not have the freedom to have things on our desk and to read them without having publication given to what we have on our desk and what we are reading?

The Court: Mr. Sacher, I have been watching too, and it has seemed to me possibly that a paper might be offered and time be taken solemnly to hand it from one to another of counsel and look it over and turn it over when all the time you had your own copy right there and knew all about it.

Mr. Sacher: If your Honor please, you will observe—

The Court: It seems to me it may be, if that is so, we could save a little time by having you just glance at the paper and make your objection and be done with it.

Mr. Sacher: I would like to make this observation: You will observe that in regard to Exhibit 8,

the prosecution offered two pages of it. Now it therefore becomes necessary to see what those two pages are and what the contents are, and the same goes for any document, and besides we don't have dozens of them—

The Court: You can take all the time you want.

Mr. Sacher: What is that?

—Tr. Tr. 1585—

The Court: You may take all the time you want to examine it.

Mr. Sacher: If your Honor please—

The Court: You are not going to create any issue here.

Mr. Sacher: This thing was created solely as a result of surveillance by Mr. Gordon and his observations, and I suggest that there ought to be an end to it. We ought to have the freedom to prepare our case and present it without surveillance from the prosecution.

The Court: You are having no surveillance. There is no use trying to raise a rumpus here.

Mr. Isserman: If the Court please—

The Court: Just go about looking at the paper and make your objection and stop this nonsense.

Mr. Isserman: If the Court please, I would like to object to your Honor's remark in respect to defense counsel and the way defense counsel is handling this case. We have just been handed a document of some 141 pages. We have a right to check it with the copy that we have to see if it is a copy. Many of the pamphlets that have gone in have gone through six and seven and ten editions,

your Honor. We have a right to compare the edition to get the date of publication, and to make a comparison to make sure that what is—that we

—Tr. Tr. 1586—

know what is going into evidence. That becomes doubly important because the Court has already ruled in such a way that we do not have access to the exhibits in sufficient time to examine it, and I object to your Honor's remarks.

The Court: Well, you know, this will still be going on next Christmas and we will never get through.

Mr. Isserman: Well, I object to that remark.

The Court: Well, object away, object away—

Mr. Isserman: I do, your Honor.

The Court: Good heavens!

Mr. Gordon: Certainly counsel is not prevented from looking at an exhibit.

The Court: No.

Mr. Gordon: Why, Mr. Sacher asked me if he could look at Exhibit 4, and we handed it to him and he has had it there.

The Court: Now you have this other one, and I think they just continue maybe they will soon decide what they are going to do about it and then we will gradually creep along.

. . . . . .

—Tr. Tr. 1602—

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Mr. Gladstein: Now if your Honor please, I desire to object for the backward manner, completely

erroneous, in which this has been handled. The usual and correct method is to ask the witness what he knows to have happened at a certain time; thereafter if his testimony is accurate it may be authenticated by reference to a document; on the other hand, if the witness does not recall exactly he may say so and refer to the document and counsel may read the document or from portions of it, but to first have the document in evidence and then show it to the witness and have the witness read from it and then ask the witness if he now recalls whether the defendants were there is, I submit, completely erroneous and improper, and I object to that procedure and move to strike the evidence that has been given along that line.

The Court: The objection is overruled and the motion is denied.

Mr. McCabe: If your Honor please, I should like to move to strike out from the testimony—

The Court: Now, Mr. McCabe, you realize what we are talking about here. Here is a man who was

—Tr. Tr. 1603—

right at that convention—

Mr. McCabe: This is another matter entirely.

The Court: —who saw all these things happen. The record shows in the book there that is in evidence. The thing is as plain as the nose on your face, and you people are objecting here, on what ground it is really difficult for me to understand. Do you claim that this man wasn't there?

Mr. McCabe: I claim that Mr. Winston was not there, and I object to it as having any binding effect

upon Mr. Winston or being permitted in evidence against him inasmuch as he was not present.

The Court: Objection overruled.

Q. What happened to the office of General Secretary that had previously existed in the Party? A. It was abolished, that is to say, the Communist Political Association had a different setup of officers.

Mr. Isserman: I suggest that the record show that the exhibit was put in the presence of the witness while he was answering the question.

The Court: You mean that somebody was prompting him?

Mr. Isserman: And I would like to have it indicated at what page it is opened. Now either the witness is testifying from his recollection or he is

—Tr. Tr. 1604—

reading an exhibit. We have got to know which he is doing, and I object to his testifying with the exhibit, unless the record shows that he is reading from it.

The Court: Application denied.

Q. Now, Mr. Budenz— A. The officers—

Mr. Isserman: May the record indicate what page the exhibit is opened at?

The Court: No, it may not.

Mr. Gordon: Mr. Isserman, if you can find a page number—

Mr. Isserman: I don't care to see it, Mr. Gordon.

The Court: Now, Mr. Gordon, just let me make a suggestion.

Mr. Gordon: All right.

The Court: You know, sometimes these objections distort the proceedings a little bit, and I think it is better if we just do not pay any attention to them and do not let anything arise to cause irritation because one thing leads to another, and you know sometimes those things are sort of—well, you better just leave them alone.

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—Tr. Tr. 1836—

New York, March 29, 1949

Q. (Continuing) That first sentence of that sixth para-

—Tr. Tr. 1837—

graph of the Preamble reads, does it not, "The Communist Party therefore educates the working class in the course of its day to day struggles for its historic mission, the establishment of Socialism."

Now, can you tell us, Mr. Budenz, what was meant and understood by you and those associated with you, including these defendants, at the time that this Constitution was adopted at the Convention in July 1945?

Mr. Isserman: If the Court please, I object to this question on the same grounds that I have objected to the prior questions put to this witness, in which his opinion is asked of the writing in that preamble, and in which question is included his understanding about that, as previously objected to. It is the same type of question, and rather than

repeat my objections at length, I make it in this form.

—Tr. Tr. 1838—

Mr. McGohey: If the Court please, I desire to indicate that I have called the Court's attention to the fact that I have not asked the witness's opinion about something. I have asked him what was meant and understood by these words, by him and the others, including the defendants, at the time that this constitution was adopted.

Defendant Dennis: If the Court please, I must object most strenuously to this line of questions and these allegations. This witness cannot speak for any defendant or any Communist. He cannot speak any more than a Benedict Arnold can speak—

Mr. McGohey: I move to strike that, your Honor.

The Court: Well, I will let it stand.

Defendant Dennis: If the District Attorney wishes to ask questions, that is a prerogative which he has—

The Court: Mr. Dennis, let me ask a question.

Defendant Dennis: —but he cannot speak for any Communist, your Honor.

The Court: Well—

Defendant Dennis: Least of all for the defendants.

The Court: I know you do not have him as your

—Tr. Tr. 1839—

representative here in any sense, I realize that, but I am wondering, Mr. Dennis, suppose somebody who was charged with a conspiracy, speaking theoretically now,—not this kind of a conspiracy but

some other—they got up some kind of a thing that might be misunderstood by a person who did not understand it and they all understood it, the conspirators, to mean a certain thing. Now don't you think that a person who worked with them would be a competent witness to testify as to what they understood, and then if the conspirators or the alleged conspirators got up, they might testify that it meant something very different, don't you think?

Defendant Dennis: Since you asked my opinion, I will at least state it very briefly. I think it will be established before very long that some of these definitions—in fact all of them—which this witness is volunteering here, can be proved to be very identical as to what Goebbels and Himmler and others, how they interpreted the principles of Marxism and Leninism. No traitor, no traitor, no Judas could interpret principles—

The Court: What did you say—no trader?

Defendant Dennis: No traitor.

The Court: Did you say t-r-a-d-e-r or t-r-a-i-t-o-r?

—Tr. Tr. d840—

Defendant Dennis: Traitor—t-o-r.

No one would ask Benedict Arnold to interpret the Declaration of Independence.

The Court: Oh, I misunderstood. You were just attacking this witness then, that is all. I will overrule the objection.

Mr. McGohey: That is right, your Honor. I move to strike out the characterizations.

The Court: Yes, strike it out.

I misunderstood. I thought you were arguing a point of law.

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—Tr. Tr. 1877—

New York, March 30, 1949

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Mr. Isserman: Mr. Gordon, before you go on, I would like to have the record note that the examination of the exhibits by the jury occupied a period of about ten minutes and that the jury in that period did not read the documents but merely glanced through them.

The Court: You know, Mr. Isserman, I have noticed several times, when papers were handed up to me here, that you lawyers for the defense would then have it noted that I did or did not read,

—Tr. Tr. 1878—

and how long I took to read, and so on. I don't believe that a man sitting where you are sitting can tell what I read or what the jury or members of the jury read when they have some document in their hands, and I don't think it proper for you to make those comments and to have these things, as you claim, put down on the record because I have no assurance of their accuracy.

Mr. Isserman: If the Court please,—

The Court: I know as to me there were many times when you or one of your colleagues had something noted as to what I had not read, when I did read it, and the time that had elapsed did not seem right. I did not feel, always, that I should get into a lot of discussion about it but I don't think it proper for you to attempt to note such things because I don't think you are in a position to know.

Budenz—Direct
Colloquy

Mr. Isserman: If the Court please, we believe that the question of to what extent the jury has these documents is—may be an issue in this case, and my observation was that the jury did not read the documents; they were riffling the pages. Moreover, I would like the record to note that it is now 10.55 and that the jury had these documents before them for a short period. It will be very material in this case, or may be very material, whether the jury has read the documents or not. If there is

—Tr. Tr. 1879—

any question about the fact, the Court can certainly ascertain that fact by asking the jurors, and I ask the Court to do so so the record may be clear.

The Court: I will allow your statement to stand for whatever it may be worth.

Mr. Gordon: Of course, the ten-minute period is not quite accurate, your Honor.

The Court: No, but I think it is better, Mr. Gordon, if, instead of trying to discuss and wrangle over all these things, we just let whatever statements are desired to be made be made for whatever they may be worth.

Mr. Isserman: I would like to have a ruling, if the Court please, on my request, or the motion.

The Court: If you desire me to say exactly how many minutes or seconds it was that the jurors had the papers or the books, and how long it was that each one had it in their hands, and what portions they read or did not read, I simply will not do it.

Mr. Isserman: I am not asking the Court to be that precise. I am asking the Court to note the

general period. If my estimate of the time length is wrong, I will take Mr. Gordon's estimate of the length of time.

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—Tr. Tr. 1908—

Mr. Gordon: Your Honor, in connection with Mr. Sacher's review of the evidence, in "The Foundations of Leninism" by Joseph Stalin, an exhibit in evidence, recommended for the Communist Party by either Eugene Dennis or John Williamson—I forget which at the moment—but it is in a paper which we have put in, at the time of the formation of the new party in 1945, in that book Mr. McGohey read to the jury the fact that Joseph Stalin, this great leader, so described by William Z. Foster, said that the United States was definitely included as one of the countries whose government had to be overthrown by this violent revolution.

—Tr. Tr. 1909—

Mr. Sacher: I object to that and move to strike that out as absolutely wrong. It does not describe correctly the contents of that statement and does not in any way affect the contents of Article—

The Court: We will get it out—

Mr. Sacher: —9, Section 2.

The Court: —and Mr. Gordon will read the very words.

Mr. Sacher: I object to that procedure, your Honor, on the ground that this is a piecemeal attempt by the prosecution to argue to the jury.

The Court: I cannot remember the exact phraseology of every exhibit and you have challenged the

accuracy of Mr. Gordon's paraphrase, if it was paraphrased language. Let us get it—

Mr. Sacher: I object to the business of these reports and these attempts to sum up to the jury in the course of an examination, in the course of consideration by the Court of an objection to a question. That is all that is involved.

The Court: You would like to do all the arguing yourself and not have the Government do any, and I am going to hear both sides in the case.

Mr. Sacher: I am willing to leave to the jury to say how much argumentation I have liked to do here.

—Tr. Tr. 1910—

The Court: I don't think that is going to be one of the things that the jury will decide in this case.

Mr. Gladstein: It seems to me that this is not the time for argumentation by anyone as to the contents of any document upon the excuse that he desires to argue for a question which he has put to this witness. Mr. Gordon purported to restate or reformulate in his own words the contents of a document in evidence. That is wholly immaterial to the question of whether Mr. Gordon's question is properly put and may be answered.

The Court: Mr. Gladstein—

Mr. Gladstein: Yes, sir?

The Court: —it is my understanding of the law that I may permit either side to read any part of an exhibit in evidence at any time I choose to do so, in the exercise of my discretion. I have heard this matter raised here. Mr. Sacher claimed that it was wrong, the statement made by Mr. Gordon was wrong, based an objection on that, and I desire

to clear that up now, and I shall clear it up.

Mr. Gladstein: Would your Honor have the reporter read to me the last question of Mr. Gordon's?

The Court: No.

Mr. Gladstein: Because there is a perfectly sound legal objection to it.

—Tr. Tr. 1911—

The Court: Well—

Mr. Gladstein: And that is, it calls on this witness to express an opinion as to unnamed persons, namely, members of the Communist Party, in a very general and vague way, and asks this witness to state what their understanding is.

The Court: Well, you see, it is so easy to have digressions and you get your mind off the point. Now, my mind at the moment is resting on the point that was raised by Mr. Sacher, namely, that Mr. Gordon had incorrectly stated something from an exhibit, and I choose to have that determined now. So, Mr. Gordon—

Mr. Gladstein: May the record record—

The Court: —will please read from the exhibit.

Mr. Gladstein: May the record show my objection on to your Honor's ruling and your overruling my objection to the question that was put to this witness?

The Court: The question has been lost in the shuffle, Mr. Gladstein.

Mr. Gladstein: I am asking your Honor to have the question read.

The Court: The question is gone.

Budenz—Direct
Colloquy

Mr. Gladstein: But this is the purpose of this trial, I thought, by question and answer to elicit

—Tr. Tr. 1912—

what the facts are.

The Court: Yes, yes. You keep it up. Go ahead, go ahead.

Mr. Gordon: Two things have been done, your Honor—

The Court: Mr. Gordon, you get busy reading that part of it so we can get along. Have you found the part?

Mr. Gordon: Yes, sir.

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—Tr. Tr. 1952—

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Mr. Gladstein: I have no objection to the contents of the book but I make this objection: I submit that it is not proper in a court of law to try men upon the fact that they recommended for study any book and, for that reason, I object to the introduction of this or any kind of book upon the ground that a man has recommended its reading or its study to any person.

Mr. Gordon: It is recommended as a guide for action.

Mr. Isserman: I have a further objection, if I may state it. I have again no objection from the standpoint of its contents but I object to the introduction of the history book in this proceeding on the ground that it is a violation of the First Amendment and, again, it seems to me as if we are putting

a book on trial, if, in fact, we are not putting history

—Tr. Tr. 1953—

on trial by the introduction of this book. Is the jury to read and study this book before it renders its verdict? Is the Court going to do it? Or shall we read it to the jury word for word and then bring in people to explain it?

It is outside the issues of this indictment.

The Court: Mr. Isserman, you get very eloquent, but it seems to me that if the contents of this book and these other pamphlets and documents of one kind or another, that were handed around, and people were told to study them and to teach other people what to do, and how they were to go around and do the things that have been testified to here, I can scarcely believe it is trying a book. It is trying those persons who used the book and other means to allegedly commit a crime, and that is part of the paraphernalia of the charge, it seems to me. I will allow it.

Mr. Isserman: I would like to object to your Honor's characterization.

The Court: I don't see how it is trying a book.

Mr. Isserman: I would like to object to your Honor's characterization of the activities of the defendants, in so far as they have been disclosed by the evidence.

The Court: I say, that is the claim. I do not say it is so. I took it from your openings that you all

deny vigorously that there was any such conspiracy

—Tr. Tr. 1954—

as charged here, but this is the prosecution's case.

Mr. Sacher: It seems to me, your Honor, that a trial which admits into evidence the history of the Communist Party of the Soviet Union is not very different from that trial which took place 170 years ago against Tom Paine for writing "The Rights of Man," for which he was tried in England under George III, and it seems to me—

The Court: Would you like to make a little argument on that?

Mr. Sacher: Yes.

The Court: Well, you are not going to do it.

Mr. Sacher: That is what I am doing.

The Court: That is the end of the argument. You will have your time to sum up at the end of the case. Then you can talk about Tom Paine and the other trials that are not relevant, but not now.

(Government's Exhibit 30 received in evidence.)

Mr. Gordon: (To jury) Government's Exhibit 30, The History of the Communist Party of the Soviet Union, contains on page 167 under a heading "Theory and Tactics of the Bolshevik Party on the question of War, Peace and Revolution," the following—

Mr. Isserman: I might say this, your Honor: we did not object to the contents, as I indicated

—Tr. Tr. 1955—

before, but now I do object to the reading of any portion of this book to the jury by the Government.

The Court: I thought you were objecting pretty comprehensively but now you say you weren't.

Mr. Isserman: I object to reading any portion or section of this book without reading all of it.

The Court: Well, how many pages are in that book, Mr. Gordon? About 400 pages?

Mr. Gordon: That is pretty close, your Honor. There are 363.

Mr. Isserman: And my ground is that you have got to read all those pages and more in order to make any sense of it. That is precisely what we are getting to and the defense is anxious to avoid it. We are getting into a big field of political ideas and philosophical ideas.

Mr. Gordon: There is nothing philosophical about this and I object to this characterization of it.

Mr. Sacher: I object to the statement by Mr. Gordon that there is nothing philosophical in that book because I think that nothing would be more tragic than for Mr. Gordon to become the censor of what the American people may or may not read. That is what this trial is about and that is what it is quite apparent it is about.

—Tr. Tr. 1956—

The Court: Quite apparent to whom?

Mr. Sacher: To everyone in this court.

The Court: Well, it is not apparent to me.

Mr. Gladstein: Can we agree that Mr. Gordon has not quite qualified himself as a philosopher?

The Court: It would simply be wonderful for the defense if we could get everybody laughing and giggling here and forget the seriousness of the charge that these men stand indicted for. After all this is no place to have continuous levity and joke cracking although a little of it goes a great ways. Let's stop objecting to one another and keeping that up ad infinitum.

We will now take a little recess for lunch until 2.30, and then we will decide about the book.

(Recess to 2.30 p.m.)

* * * * *

—Tr. Tr. 2014—

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Mr. Gladstein: I wish to make the same objection to this document that I have made with respect to all books and written pamphlets that have been received here upon all of the same grounds, except to urge this new one, your Honor, that it now appears that not only is a book being placed on trial but two editions.

Mr. McGohey: I move to strike that, your Honor. There isn't a scintilla of evidence, in anything that

—Tr. Tr. 2015—

has been testified to up to now, that anybody but these defendants are on trial.

The Court: Yes.

Mr. McGohey: And I object to that characterization and ask your Honor to strike it out.

Mr. Sacher: May I amend it then to say that the defendants are on trial because they circulated books.

The Court: Because they have circulated books and did other things and made statements as part of the conspiracy to overthrow the Government of the United States by force and violence.

Mr. Sacher: There is no such charge.

Mr. McGohey: You mean to advocate—

Mr. Sacher: In this case there is no such charge.

The Court: That is what the case is about.

Mr. Sacher: No. I ask your Honor to charge the jury that that is not what this case is about, and that there is no such charge in the indictment.

The Court: I suppose I will have to go back to get the exact wording of it, although you probably remember it.

Mr. Isserman: If the Court please, before the Court does, I move for the withdrawal of one juror and a mistrial on the ground that the Court's im-

—Tr. Tr. 2016—

proper characterization of the charge in the indictment would seriously prejudice all of the defendants.

The Court: Yes, I will deny the motion. As you remember, ladies and gentlemen of the jury, the charge is that the defendants wilfully and knowingly did conspire with each other and with divers other persons to the grand jurors unknown to organize as the Communist Party of the United States of

America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty of necessity of overthrowing and destroying the Government of the United States by force and violence.

That, as I have explained several times before, is the charge, and I meant nothing different in my slight abbreviation of a few moments ago.

Now, I charge you that no books are on trial here. These individual defendants, that you see here, who once in a while seem to enjoy the proceedings so much, are the ones on trial, not any books, and so we will now go ahead.

Mr. Gladstein: I have a motion to make.

Mr. Isserman: Your Honor, I have an objection—have you one? I yield to Mr. Gladstein.

—Tr. Tr. 2017—

Mr. Gladstein: I move that the remarks you have just made concerning the enjoyment—

The Court: I see them smiling, sneering and snickering there. The jury undoubtedly sees it as well.

Mr. Gladstein: Just a minute. If your Honor please, I assign those remarks as prejudicial misconduct on the part of the Court. I assign as misconduct your refusal to permit me to make an objection.

The Court: When did I refuse?

Mr. Gladstein: By your interruption at the present time and by pyramiding the misconduct which

I am assigning. I ask the Court to instruct the jury—

The Court: You are now told that you may go ahead and make your remarks in extenso.

Mr. Gladstein: Now if the Court please, I assign the Court's remarks concerning the enjoyment by these defendants of a trial in which they are here charged with, as the evidence so far shows, circulating books is not accurate, your statement is not accurate and the basis—no basis exists upon which it could be accurate, and I submit that that kind of remark, particularly when your Honor said to me at the close today, your Honor charged me with levity, your Honor charged me with levity, and I submit—

The Court: It was an innocent sort of levity, I suppose.

—Tr. Tr. 2018—

Mr. Gladstein: Well, I am assigning the Court's remarks as more than levity and not innocent in its effect on the jury, and I ask the Court to charge the jury to disregard the remarks that the Court has made.

The Court: Well, I will not make any such instruction.

Mr. Gladstein: Then I ask the Court—

The Court: Their conduct has been open to the view of all the jury as well as myself.

Mr. Gladstein: I submit that those remarks that the Court has just made are prejudicial and I ask for a mistrial.

The Court: Well, the motion is denied.

Mr. Isserman: Now if the Court please, I move again for the withdrawal of one juror and for a mistrial on the grounds which I previously urged that the Court had misstated the charge, and on the further ground that the peremptory reading of the indictment which the Court indulged in subsequently did not cure the prejudicial error, and on the further ground that the Court's remark with reference to the enjoyment by the defendants of this proceeding was wholly uncalled for by any fact in evidence, by any conduct of the defendants, and if it were—

The Court: Well, they were right behind you, you couldn't see them.

—Tr. Tr. 2019—

Mr. Isserman: And if it were—

The Court: You couldn't see them.

Mr. Isserman: —it was not the function of the Court to make a comment of that kind, and it prejudices the defendants and interferes with the conduct of the defense.

The Court: Well, I thought I had put a stop to it.

Mr. Sacher: If it please the Court—

Mr. Isserman: I would like a ruling on my motion.

The Court: The motion is denied.

Mr. Sacher: I wish to object to the Court's conduct and I move for a mistrial on the ground that your Honor has compounded—compounded the offense which your Honor committed in the characterization of the nature of the charges, for after

you read the indictment to the jury you said that your previous characterization was a slight abbreviation of what you had read; in other words, what your Honor said to the jury was that this indictment charges the defendants with conspiracy to overthrow the Government of the United States, and I say that this indictment does not contain any such charge, and to the extent that your Honor has encouraged the jury to believe that, your Honor is making it impossible for these defendants to have

—Tr. Tr. 2020—

a fair trial within the meaning of the Fifth and Sixth Amendments—

The Court: You had better get down to something substantial.

Mr. Sacher: And I respectfully move that your Honor declare a mistrial by ordering the withdrawal of a juror.

The Court: Motion denied.

Defendant Dennis: I wish to state very briefly to the Court, to the jury, that neither I nor my co-defendants—

The Court: Well, I saw you. You are one of the chief offenders.

Mr. Dennis: Neither I nor my co-defendants enjoy this proceeding. I would remind the Court that we eleven are faced with 120 years' imprisonment and on a collateral charge with another 120 years, but more important, we realize, too, that if the allegations as set forth in the indictment, and if the Budenz fables were to prevail, that our party would be outlawed, and with it the First Amendment to

the Bill of Rights, and therefore, your Honor, I say we do not take this trial lightly and while we do not enjoy the proceedings, I can assure you that each of us to the best of our capacity and jointly will nonetheless defend our honor, our convictions,

—Tr. Tr. 2021—

our rights.

The Court: All right, Mr. McGohey, go ahead.

Mr. McCabe: Your Honor, I should like to make a separate motion for the withdrawal of a juror and the declaration of a mistrial on the ground that your Honor's attitude towards all counsel for the defendants has so lowered their effectiveness in the eyes of the jury or has tended to reduce their effectiveness as effectively to deprive all the defendants of the services of their counsel and to discount in the eyes of the jury objections, statements and any other activity which counsel make.

The Court: Motion denied.

Go ahead, Mr. McGohey.

* * * * *

—Tr. Tr. 2041—

New York, March 31, 1949

* * * * *

Mr. Isserman: If the Court please, at this time I move to strike the testimony hereinafter referred to and the documents hereinafter referred to on the grounds which I will indicate.

First, the testimony of the witness on page 1344, relating to an alleged conversation that the witness had in the fall of 1935, concerning his joining the

Communist Party, it is a conversation with Mr. Stachel and runs from page 1344 to page 1350. My reason for moving to strike this testimony is as follows:

That it does not refer to any of the issues in the indictment; it relates to a time long prior to the period covered by the indictment; cannot be deemed as evidence of intent since the period covered antecedes the date of the statute; it is not admissible as background or preliminary matter, not being pleaded in the indictment: it is confusing and prejudicial to the defendants; constitutes unfair surprise to the defendants; and the net effect of the testimony is to divert the jury from an understanding of the issues in the case and thus to obscure and suppress

—Tr. Tr. 2042—

the truth rather than to reveal it.

Much of this testimony violates both the rule with respect to the confusion of issues as well as the rule with respect to undue prejudice. It is also hearsay and it is not binding on the defendants.

The second portion which I desire to strike is the testimony on page 1350, beginning at page 1350 of the transcript—

The Court: Don't you think I had better pass on these as you make them? If you have, say, 60 or 70 of these to make, I will never remember them by the time you get to the last. I remember this first one, and I think, possibly, it will be a little easier for me to follow as to each section at the close of it, don't you think?

Mr. Isserman: I think that might be an idea.

The Court: I deny that first part.

Colloquy

Mr. Isserman: Would your Honor want to hear me on it?

The Court: I thought I just did hear you.

Mr. Isserman: I stated the grounds. I would like to argue the grounds, if your Honor will permit.

The Court: Well, the grounds as stated seemed to me to be very—go ahead. Maybe you have something there.

—Tr. Tr. 2043—

Mr. Isserman: In this connection I would like to call your Honor's attention to the recent decision by the Supreme Court in the case of Krulewitch v. The United States, which was decided last month, No. 143, October Term, 1948, in which, in a separate concurring opinion Justices Jackson, Murphy and Frankfurter pointed out the dangers in the admissibility of evidence in conspiracy cases—in the admission of evidence in conspiracy cases. For example, Justice Jackson said, and I am referring to Law Week Citations, which is—

The Court: I am familiar with that. I think I know just—

Mr. Isserman: It is reported in 17 Law Week and I am referring to page 4276, in which it was said that "The prosecution"—"Normally, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficulty for a judge to control. As a practical matter, the accused often is confronted with a hodge-podge of acts

and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of

—Tr. Tr. 2044—

the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only u) on assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury"—citing a number of cases; citing a particular case—"all practicing lawyers know to be unmitigated fiction."

This testimony as well as the other testimony to which I shall refer, including the excerpts which have been read from documents, constitutes the very type of hodge-podge which the Supreme Court talks about in the Krulewitch case; and even at this very stage of the material which has been admitted before the jury on the ground of background and on the ground of preliminary matter, and in the manner in which was admitted, has already led to much confusion of the issues, has already misled the jury, to the point where it is impossible for them to form any judgment whatsoever.

Now, with respect to the matter, we have indicated that it antedates the statute, we have indicated also that in that period the Communist Party had been dissolved, had become the Communist Political Association, and had been reconstituted in 1945, the period alleged in the indictment that is charged by

—Tr. Tr. 2045—

the Government, and that is one thing which the Government seeks to establish. And under these cir-

cumstances, this testimony going back to 1935, when he had a conversation with one of the defendants, is admissible for all the reasons stated.

The Court: Do you desire to say anything about that, Mr. McGohey?

Mr. McGohey: Well, only this, your Honor, that with respect to the citation and the argument based upon the Krulewitch decision, I don't have the decision here before me, but I have read it, and I have some familiarity with that Krulewitch case because it is a case which came up from this district—

The Court: Yes; tried several times here.

Mr. McGohey: Yes. As a matter of fact, your Honor, Mr. Wallace, who is sitting alongside of me here, tried it the first and second times it was tried. The application or the effort at applying the decision and particularly Mr. Justice Jackson's opinion, to this case here, I think, misses the mark because it is clear from the record in the Krulewitch case that the evidence that Mr. Justice Jackson was talking about is an entirely different kind of evidence with an entirely different thrust, than the evidence which the witness Budenz gave with respect to these

—Tr. Tr. 2046—

conversations.

Here the testimony is with respect to conversations by a defendant presently on trial, as to what he said and what he did with this witness at the time this witness was becoming a member of the Party, and under the jurisdiction and under the direction of the defendant Stachel.

Colloquy

Now, there is, of course, an abundance of law to support the proposition that you can go beyond and go back of the period in an indictment in order to show intent.

The Court: Yes.

Mr. McGohey: And your Honor was careful to restrict the introduction—the reception of that evidence and, indeed, it was only offered as against the defendant Stachel and not the others.

The Court: All right.

Mr. McGohey: Clearly, your Honor; I think that the ruling of the Krulewitch case does not apply here.

The Court: Motion denied.

Mr. Isserman: If your Honor please, there is this consideration in the Krulewitch case—

The Court: How many of these have you got, Mr. Isserman?

—Tr. Tr. 2047—

Mr. Isserman: I have a number. I will not argue them all. I will not repeat any argument.

The Court: I don't think I need any further enlightenment on this. It seems to me a rather elementary thing, so that I deny that motion.

What is the next one?

Mr. Isserman: On page 1350 of the testimony to page 1369 there is a conversation relating to—there is testimony relating to a second conversation between Stachel and the witness. To this testimony we make the same objection.

Mr. McGohey: I beg your pardon, Mr. Isserman. What is that page you are referring to?

Colloquy

Mr. Isserman: Page 1350 running through to page 1369.

Mr. McGohey: Thank you.

Mr. Isserman: Second conversation.

This is a conversation which took place in 1935 and includes the alleged criticism of an article which Mr. Budenz had written in connection with his joining the Communist Party.

—Tr. Tr. 2048—

And we object to this evidence on all the grounds which I had urged on my objection to the first item of evidence.

The Court: Motion denied.

Mr. Isserman: My next motion to strike goes to Government's Exhibit No. 1 which is referred to on page 1356 and refers to the announcement of Mr. Budenz joining the Communist Party—1365, I am sorry— I misread the citation.

To this exhibit I raise all the objections that I have raised in the first item and add that it brings in a host of new issues which are irrelevant to this proceeding and is confusing to the jury, far outweighing any probative force it has. My contention is that it has none whatever.

The Court: Let me see that Exhibit 1.

Mr. McGohey: While that is being sought, your Honor, I ask Mr. Isserman's and the Court's permission to make an observation here. I am looking at the record here as we go along, and I find out that with the exception to the reference to the Krulewitch case—I do not know that Mr. Isserman has called that to the Court's attention before but the trend of

legal argument which is being made now was made and in more detail by him, and the objections, at the time this evidence was received and at the time

—Tr. Tr. 2049—

these exhibits were received, so what we apparently are doing now is going over again the objections in the form of arguing a motion.

Mr. Isserman: If the Court please, I have added additional grounds which I want to urge in respect to each of these items, and at this time state my—make this motion to strike because the Court having overruled objections the motion to strike is in effect a motion to reconsider the objections made as well as advancing new grounds which we are calling to the Court's attention.

The Court: Well, if what you are doing is just asking me to reconsider my rulings on evidence, I don't know—I thought these things that you had were not raised before or you wanted to make your record clear, and although you didn't say so specifically I got no idea that you were just repeating the objection.

Mr. Isserman: I am not just repeating the objection, your Honor. That is what Mr. McGohey said. I said I have added new grounds.

The Court: Well, you said that two or three times and it turned out that he was right.

Mr. Isserman: Well, I will ask Mr. McGohey if he will go to my first objection and show me where—

The Court: Well, I am not going to take the time to go over each one of these things a half dozen

—Tr. Tr. 2050—

times to see if there is some word left out.

Colloquy

Now let me look at this Exhibit 1 and see what it is that is that is so bad about it.

Mr. Isserman: Certainly nothing good about it so far as the evidence goes—

The Court: What is that?

Mr. Isserman: Certainly nothing good about it: it has no probative value.

The Court: All right, then I will deny the motion; it cannot hurt anybody if it has no value.

Mr. Isserman: No, I said it was prejudicial. I said there was nothing good about it. Your Honor said, "Let us see what there is bad about it." I said it was prejudicial.

The Court: Well, let me look at this, the host of collateral issues that you said it raised. I was trying to find them. What is that host of collateral issues?

Mr. Isserman: If I can see the exhibit I will call it to your Honor's attention.

The Court: Well, don't you remember without looking at it? You are making the motion.

Mr. Isserman: I would like to look at the exhibit when I refer to the items, your Honor.

The Court: Yes, I see.

—Tr. Tr. 2051—

Mr. Isserman: First of all, there is a question of whether Mr. Budenz was executive secretary of the American Workers Party.

Secondly,—

Mr. McGohey: May the record show that Mr. Isserman is reading from a copy of the exhibit while he is making his argument?

Mr. Isserman: That is right. I am reading from a copy of Exhibit No. 1.

Colloquy

Secondly, there is the statement that the Communist International constitutes the sole challenge to the capitalist world.

Thirdly, there is a statement—thirdly, there are statements relating to the Seventh Congress of the Communist International, which statements will have to be explained and met.

Fourthly, there is a whole discussion of Trotskyism which is contained in the article.

Fifthly, there is a characterization of the Communist movement in America which appears in the last paragraph.

Sixthly, there is a question of the merger of the American Workers Party with the Trotskyites and the reasons therefor, and the characterization of that merger by Mr. Bundenz.

—Tr. Tr. 2052—

These are all issues which have been injected into this proceeding by this exhibit and which the defendants will have to meet if the exhibit remains in evidence.

The Court: Well, we will meet that when we come to it. I will deny the motion.

Mr. Isserman: Next is the testimony on page 1371 relating to the directions which Mr. Bundenz received from Mr. Stachel in connection with going to Chicago to take charge of the Midwest Record. To that we urge all the grounds that I urged with respect to item No. 1.

The Court: Motion denied.

Mr. Isserman: Next is the testimony appearing at pages 1448 and 1449 relative to the discontinuance—

Colloquy

Mr. McGohey: Pardon me; may I interrupt just a moment, please?

Now, your Honor, I should like to direct your Honor's attention—I do not know whether you have the minutes here or not—

The Court: Yes, I have.

Mr. McGohey: Well, turn to page 1371.

The Court: 1361.

Mr. McGohey: 1371.

The Court: 1371; all right, I have got it.

Mr. McGohey: You see there Mr. Isserman says,

—Tr. Tr. 2053—

"I object to that question on the grounds previously urged, your Honor," and if you go back you will find that Mr. Isserman, at the time he was objecting to the introduction of this testimony, made the same argument that he is now making before you.

Mr. Isserman: I wish to state that I did not make the argument. I did not urge all the grounds which I am urging now.

Mr. McGohey: Well, I suggest, then, your Honor, that the mover ought to indicate to the Court and to the counsel for the Government what are the new grounds so that we may direct our attention to those. I take it that the Court having ruled on the grounds previously urged, that we ought not go over the argument on those grounds again.

Mr. Isserman: We are not making any argument. I am merely restating the ground. The Court has already precluded argument.

Mr. McGohey: Precluded argument?

Colloquy

The Court: Precluded argument. I know, Mr. Isserman, you and your colleagues have said many, many times how I have precluded argument. I don't know how a Judge could listen to more argument than I have been listening to here, and yet the more

—Tr. Tr. 2054—

I listen the more you insist that I refuse to listen, but go ahead, you make the argument.

Mr. Isserman: All right.

The Court: You make it, I will listen to it in extenso.

Mr. Isserman: I am making it.

The Court: Go ahead.

Mr. Isserman: I am not making it in extenso.

The Court: Well, make it the way you want to make it.

Mr. Isserman: I am making it the way I want to make it.

The Court: That is just fine. Now go ahead and do it.

Mr. Isserman: Now there is a motion pending before your Honor.

The Court: Have you some new motion addressed to this new colloquy that we have had?

Mr. Isserman: No. I am back to my original motion.

The Court: Do you want to have the reporter read it so you can get your trend of thought back?

Mr. Isserman: No. I know my trend of thought. If your Honor would like me to repeat it I will.

The Court: I don't think I would like to have that

—Tr. Tr. 2055

done.

Mr. Isserman: Then let the reporter read it.

(Record read.)

Mr. Isserman: Now if the Court please, my next reference is to the testimony of page 1398, running over to 1400—I am sorry.

The motion which I was making when I was interrupted related to the testimony at page 1448 and page 1449 relative to the discontinuance of the publication of the Daily Record in Chicago and which refers to the Hitler-Stalin pact. The Court will remember that this testimony was first given at page 1387, it was stricken, and was subsequently readmitted. We urge that it be stricken on the grounds we urged in the first motion I made this morning and add to them that this is a conclusion of facts not in evidence.

The Court: Motion denied.

Mr. Isserman: My next reference is to the testimony at page 1398 and running over to 1400, and relates to events prior to the indictment in regard to which the witness testified he was advised by Browder he was made president of the Freedom of the Press Corporation, and I urge the objections that I have urged in respect to the first motion to strike.

The Court: Was that the part where he said they

—Tr. Tr. 2056—

made him president of that because they might have to make out the Daily Worker wasn't connected with the Party any more?

Mr. Isserman: Yes, that there was some protective reasons, some reference to protective reasons which—

The Court: Motion denied.

Mr. Isserman: My next reference is to page 1405 which relates to the receipt by the witness of four books from the defendant Stachel. We say that this testimony in addition to the grounds, which I have urged on the first motion to strike this morning and the books in question are protected by the First Amendment and that evidence relating to the receipt of said books should for that additional reason be stricken.

The Court: Motion denied.

Mr. Isserman: My next motion relates to the testimony on page 1409 to page 1416 which refers to and includes the reading of Government's Exhibit 2, and I include in this motion the motion to strike Government's Exhibit 2 which was a resolution by Stalin passed by the Seventh World Congress in 1945, and this is in addition to the grounds I have urged on my first motion: that this brings in a great number of issues not related to this proceeding and relates

—Tr. Tr. 2057—

to political activity which is protected by the First Amendment under the clause guaranteeing freedom of assembly.

If I said 1945 I meant 1935.

The Court: That is the one where the resolution wound up "and the Communists will always and everywhere be faithful to the end to the great and

invincible banner of Marx, Engel, Lenin and Stalin." You say that is not relevant?

Mr. Isserman: I say it is not relevant. It goes back to 1935. It can't be deemed as evidence of intent. It is not evidence or relevant as background, is prejudicial and constitutes surprise to the defendants, it is not binding.

The Court: It seems to me that the burden of all these motions is that you claim that if a crime is established by statute and that crime is one only when wilfully done and hence involving intent, that acts and statements prior to the passage of the statute are necessarily not admissible as bearing on the intent?

Mr. Isserman: That is one of our contentions.

The Court: Well, that is the only thing I see and it seems to me almost absurd on its face. You could have this statute passed as it was in 1940, and if they caught somebody right away, somebody who in the

—Tr. Tr. 2058—

judgment of those charged with the enforcement of the law was violating the law which took effect in 1940—

Mr. McGohey: June 28, 1940.

The Court: —June 28, 1940, then if you are right then all the things the man had done even a week or two before, which manifested his unlawful illegal intent—

Mr. Isserman: First of all, it wasn't unlawful in the week or two before and here we are talking about ten years before.

The Court: I know, but even though it might be at the moment unlawful it might really show an intention to teach and advocate or to form an assembly of persons who would teach and advocate the overthrow of the Government of the United States by force. Now intent is something that does not spring up at the moment of passing some resolution. There may be a background to it. I just can't agree with your argument, that is all. But that is the only point of law that I see in all these motions, but you may proceed if you desire to.

Mr. Isserman: Your Honor doesn't desire me to argue the other points of law? I think upon argument your Honor would be persuaded.

The Court: If you desire to put on the record that I have refused to hear you I will again put on the

—Tr. Tr. 2059—

record that I have not refused to hear you and then we will go on doing that as we have so often.

Mr. Isserman: Your Honor is putting on the record that which I have not previously referred to. If your Honor desires to hear argument, which your Honor says he doesn't see any substance to, I will be very glad to do so.

The Court: Then I think you would be wise in doing so, because if there will be statements made like the ones you made I would rather have you make the argument. I don't see any merit to it but go ahead. I am not telling you not to do it. Go ahead and please do not put on a statement that I have refused to listen.

Mr. Isserman: I have not made such a statement at this point and I will put such statement on the record only when in my opinion I think your Honor is precluding me.

The Court: And when I am not I will put a statement on the record that I am not.

Mr. Isserman: Now the next motion refers to testimony between pages 1419 and 1424 relating to the Seventh World Congress of the Communist International and I urge in respect to this motion all of the grounds urged including the ground that these references bring issues into this case which have no relevance to any issue of the indictment and open up the door to collateral issues to which, first, the de-

—Tr. Tr. 2060—

fendants plead surprise, and which will require considerable time and evidence to refute, including, as our preliminary investigation indicates, the taking of depositions in other countries for which we will make application shortly.

The Court: We will pass on those when we get them. The motion is denied.

Mr. Isserman: The next motion to strike refers to the Budenz testimony on 1450 to 1455 of the record which relates to the program of the Communist International which was adopted in 1928 and which is in evidence as Government's Exhibit 3. I move to strike this document and this testimony for all of the reasons given in connection with my first motion to strike and on the further grounds that its possession and circulation and distribution is protected by the First Amendment, and on the further ground

that the excerpts read therefrom were confusing and misleading to the jury and did not disclose the true and full nature of the document.

The Court: Motion denied.

You know, Mr. Isserman, I suggested, I think, on the first day of the taking of testimony that some working arrangement be made between counsel for both sides about the defense reading such portions of these exhibits as they thought explained or qualified what was read by the prosecution. Has any

—Tr. Tr. 2061—

progress been made on those conversations?

Mr. Isserman: There wasn't.

The Court: Did you make any endeavor to comply with my request?

Mr. Isserman: We have made endeavor to comply with your request to the point that the defendants and their counsel have considered the Court's request. We find one of our observations on the material introduced thus far is that the selection of the Government of its passages is so eclectic and so brief in relation to the entire document that for us to add three or four more paragraphs or another chapter would be simply to add to the confusion and not to clarify; and in many cases the entire document must be read and further explanatory material in reference to that document be introduced before it could possibly be comprehensible to any person not familiar with Marxism-Leninism, and further—

The Court: If your views have any substance we will be here a good many years in this trial.

Colloquy

Mr. Isserman: Well, your Honor, the Government is bringing in these documents, not the defendants. They are bringing in volume after volume and book after book with regard to a philosophy that took a hundred years to develop, and that is what is really on trial.

—Tr. Tr. 2062—

The Court: Suppose, Mr. Isserman, speaking hypothetically, there is a charge that A, B, and C conspired to teach and advocate the overthrow of the Government of the United States by force and violence, and we will say for the purposes of argument that they all got together and they got up certain papers that said that in the most unequivocal language in so many words, they had everything down there about how they were going to get the fellows that were going to do it, what arms and ammunition they were going to have, how they were going to get to the President's house and blow up the house, and then in an additional 750 pages of a document they had a recital of a whole lot of things which had nothing to do with the overthrow of the Government by force and violence but spoke in the most extravagant terms of how good all these people were and that they did this and they did that and the other thing. Do you think the other 750 pages would have to be all read?

Mr. Isserman: That is not the case I am talking about. That is not this case. And I can point out what the essential difference is.

The Court: It would seem to me if there were certain parts of this book that were relevant to the

charge that anything that bore on that same sub-

—Tr. Tr. 2063—

ject that was in the book might well be read to qualify or modify it, but mere things that had absolutely no reference to it—

Mr. Isserman: Well, if it has absolutely no reference to it, that is another matter. But the essential difference between this case—and I think it is important that we understand it—and the hypothetical case that your Honor has given is, that in this case, unlike any other case under which there was a charge of unlawful advocacy, the words of "unlawful advocacy" are not set forth in the indictment, were never furnished in any bill of particulars, and what is charged is that the alleged unlawful conduct, what the prosecution charges was the alleged unlawful conduct, arises out of the adoption of certain principles, that is, the principles of Marxism-Leninism.

The Court: What we were talking about is your statement that you had to read the whole book.

Mr. Isserman: I am getting to that, your Honor.

If the issue before the Court is, what is Marxism-Leninism? Then the Court is faced with that problem of determining what it is and of determining what evidence is relevant on that question, and the jury is faced with the problem of determining what those principles are and what the whole series of

—Tr. Tr. 2064—

principles are out of which Marxism-Leninism is derived.

And further, out of the very nature of that—

Colloquy

The Court: If you did all that you might forget about the charge of teaching and advocating the overthrow of the Government by force and violence.

Mr. Isserman: You would not, because Mr. McGohey has said that Marxism is not merely a dogma but a guide to action and you must therefore understand how the language has been derived, how it is applied, and the Government just can't pick a line here and a paragraph there and expect to present either to the jury or to the Court or to anyone what the principles of Marxism-Leninism are.

The Court: If you feel you have to do this thing, when it gets around to the defense it will be—

Mr. Isserman: That is one of the reasons we have urged most strenuously that this is not an issue triable in a court of law.

The Court: You may have a misconception of the issue.

Mr. McGohey: I think the question of whether this is an issue triable in a court of law was determined by the Congress of the United States when they passed this statute. Now if it be, as the defendants have claimed in their pretrial motions, that this is a statute that the Congress constitutionally

—Tr. Tr. 2065—

cannot pass, that is a law question which has been determined in this case, and I presume the question is reserved for an appeal if the case ever gets up on appeal where the higher court will determine it.

We are getting to the point where we are arguing matters of law which were argued for three days last October before Judge Hulbert and passed upon

by him. And while I am at it I desire to object to the statement that Mr. Isserman made that Mr. McGohey said something about Marxism being a guide to action. Mr. McGohey did not say that. That was said many, many years ago by Mr. Marx himself, and apparently it has been repeated in a great many of the exhibits, and if I said it that was true only in the sense that my voice expressed the words.

Mr. Isserman: I didn't mean that Mr. McGohey was creating a new principle of Marxism-Leninism.

The Court: It is wonderful the way you can get a response from your adherents.

Mr. McGohey: I am grateful for the compliment.

The Court: The roar in the back of the room ought to be noted in the record. There is evidently quite a crowd.

Mr. Isserman: I don't know that it is more

—Tr. Tr. 2066—

crowded than any other day.

The Court: Quite a crowd of adherents, we will say.

Mr. Isserman: The point I was making had nothing to do with the statute. The statute didn't say you could indict a group of persons for advocating a body of principles. That is something that finds its way into the indictment, and the charge in the indictment is that the defendants were teaching Marxism-Leninism. That is not found in the statute.

The Court: I think you can keep arguing for practically an indefinite period. What is the use of our going into this point now? I was asking you

a question about reading all these books. You took the position that if there was a book read from that you couldn't have a paragraph or two or ten or twelve pages in explanation, you had to read the whole book. I have to see that to believe it.

Mr. Isserman: Certainly you couldn't try any ideas of, say, Christianity by quoting a few passages out of the Bible.

The Court: I really think that is a comment that you ought not to make. How you can compare what we have been hearing here with the doctrines of Christianity is beyond me.

—Tr. Tr. 2067—

Mr. Sacher: The Romans did it.

The Court: I think if we leave religion out of this it will be the better thing to do. It has been my judgment in many, many years of practice that the man who starts talking about religion usually is sorry he did.

Mr. Isserman: Your Honor, I wasn't talking about religion.

Mr. Gordon: Excuse me.

The Court: Yes, Mr. Gordon?

Mr. Gordon: To borrow an expression, may I say that it is 20 minutes to twelve and I would appreciate a recess.

The Court: Yes, let's have a recess for ten minutes.

(To Mr. Isserman) Do you think we ought to excuse the jury for the day?

Mr. Isserman: I don't see any reason for that.

The Court: You think you will be through in ten minutes?

Colloquy

Mr. Isserman: It will take longer than that.

The Court: Maybe I better excuse them for lunch. Well, I don't think I better do that. I will take a short recess and see how things go.

(Short recess.)

—Tr. Tr. 2068—

Mr. Isserman; If the Court please, I now move to strike out the testimony of Mr. Budenz found on pages 1500 to 1503-a in which the witness discusses submitting his article to the defendant Stachel, as he described it, as a matter of Communist discipline. We urge—I urge all the grounds of striking this testimony that I urged in respect to the first motion I made this morning.

The Court: Motion denied.

Mr. Isserman: The next testimony which I move to strike is the testimony of Mr. Budenz running from 1504 to 1528 and refers to Government's Exhibit 4. In connection with this motion I move to strike out Government's Exhibit 4 as well, and all excerpts which have been read from that exhibit, which is known as Peters' Manual—urging all the grounds that I urged in connection with my first motion to strike, and further that the possession of this document and its circulation was protected by the First Amendment to the United States Constitution and that it has not been established to be an official document of the Communist Party which was organized and constituted in 1945.

The Court: Motion denied.

Colloquy

Mr. Isserman: I move to strike out the next Government's Exhibit No. 5, and all testimony in relation thereto, on the same grounds that I have

—Tr. Tr. 2069—

just moved to strike Government's Exhibit No. 4.

The Court: Motion denied.

Mr. Gordon: What was that last page? I am sorry.

Mr. Crockett: 1525 to 1543.

The Court: "Why Communism," by M. J. Olgin.

Mr. Isserman: That is right. The testimony in relation thereto appears at pages 1525 to 1543, including the reading of excerpts, and in respect, your Honor, to these two matters—

The Court: Which two matters?

Mr. Isserman: That is, Government's Exhibits 4 and 5, I would like to add to my motion there that the reading of the excerpts was confusing and misleading and—

The Court: Well, didn't you say that you made the motion on all the grounds previously urged about the other one? It seems to me I have heard you say that several times.

Mr. Isserman: All the grounds previously urged in my first motion, which doesn't include that.

The Court: All right, motion denied.

Mr. Isserman: I wonder if I have finished. What I meant to say is that the excerpts as read were confusing and misleading and did not afford—did not give the jury the true meaning of the document.

—Tr. Tr. 2070—

I now move to strike Government's Exhibit 6 and all evidence relating thereto, pages 1546 to 1553, as

well as the material read therefrom. That is the exhibit known as Foundations of Leninism. And I also move to strike—

The Court: By Stalin?

Mr. Isserman: By Stalin.

And I also move to strike the reading from that exhibit at subsequent occasions, including this morning.

The Court: Motion denied.

Mr. Isserman: My next motion to strike relates to testimony appearing on pages 1554 to 1556, referring to Government's Exhibit No. 7, as well as the quotation therefrom, which appears from pages 1558 to 1561. This describes events in January 1944 when the Communist Party dissolved and became the Communist Political Association. I urge the grounds that I urged in respect to my first motion to strike, and the further additional ground that the document, Government's Exhibit 7, describes political activity which is protected under the First Amendment under the right to assembly, right to petition, and the right to free speech.

The Court: Motion denied.

Mr. Isserman: I make the same motion with respect to Government's Exhibit 8, which relates generally to the same subject matter.

—Tr. Tr. 2071—

The Court: Motion denied.

Mr. McGohey: Were there any pages for that?

Mr. Isserman: Government's Exhibit 8. I do not seem to have the page numbers for that available at the moment.

Colloquy

The Court: You mean the pages of the record?

Mr. Isserman: That is right.

Mr. McGohey: I was just inquiring whether you had stated them.

Mr. Isserman: No, I had not stated them.

Mr. McGohey: Thank you.

Mr. Isserman: And as well to Government's Exhibit 8-A, making the same motion on the same grounds.

The Court: I do not seem to have any 8-A, unless that is part of the pamphlet that was marked in evidence.

Mr. Isserman: It is 8 and 8-A. 8-A is part of 8, so my motion—

The Court: Isn't 8 merely for identification?

Mr. Isserman: I think Government's Exhibit 8 was a newspaper, and 8-A was the portion that was offered. Therefore, my motion is directed to 8-A, rather than to 8.

The Court: All right. Motion denied.

—Tr. Tr. 2072—

Mr. Crockett: That is referred to on page 1566.

Mr. Isserman: Government's Exhibit 8 is referred to on page 1566.

Mr. Shapiro: It is not a newspaper. It is a booklet.

The Court: It turns out not to be a newspaper.

Mr. Isserman: It is a publication.

The Court: My first supposition was right, because I thought my notes indicated a booklet, which is a copy of the Communist for February 1944, was merely marked for identification. The pages, pages 107 and 108, were marked Exhibit 8-A in evidence,

and, with respect to that you make your motion and I deny it.

Mr. Isserman: That is correct.

I now move to strike the testimony of Mr. Budenz commencing on page 1570 and going on to page 1582, referring to a meeting of a group of national leaders, concerning which the witness conversed with Davis, and at which the witness was not present. It was a meeting which was held to consider Foster's letter. We object to that on all the grounds that I urged in the grounds to my first motion to strike.

The Court: Did the witness say that somebody had told him about it?

—Tr. Tr. 2073—

Mr. Isserman: Yes, he said Mr. Davis told him about it.

The Court: Then I allow it to stand.

Mr. Isserman: I next move to strike—

Mr. McGohey: Your Honor said you would allow it.

The Court: Allow it to stand.

Mr. McGohey: That denies the motion.

The Court: Yes, I deny the motion.

Mr. Isserman: Yes, I understood your Honor's remark to mean that.

I next move to strike Government's Exhibit 9, reference to which appears on page 1587. and all the testimony relating thereto, and excerpts read therefrom, this being the proceedings of two Conventions unrelated to the matter alleged in the indictment.

Colloquy

In addition to urging the grounds I urged in respect to my first motion to strike I urge the fact that possession and circulation of the document are protected by the First Amendment to the United States Constitution, and that it describes political activities also protected by that Amendment.

The Court: Motion denied.

Mr. Isserman: I also move to strike testimony beginning on page 1597, referring to certain sections of Exhibit No. 9 and names mentioned therein.

—Tr. Tr. 2074—

The Court: Motion denied.

Mr. Isserman: I now move to strike the witness's testimony appearing on pages 1608 to 1612 referring to a meeting of the United Nations in San Francisco and communication to the staff of the Daily Worker by Joseph Starobin on the grounds previously urged with special emphasis on the fact that this matter was prejudicial to the defense.

The Court: Motion denied.

Is that the way you pronounce that name? Somebody called it Starobin.

Mr. Isserman: I think it is Starobin.

Mr. Gordon: Mr. Reporter, that is with the accent on the first syllable, the second pronunciation given by Mr. Isserman.

Mr. Isserman: My next motion, if your Honor will permit, includes Exhibits 12 and 12-A. I think that is—

The Court: What made you think I wasn't going to permit you?

Mr. Isserman: I was going to try to include several of the exhibits together.

Colloquy

The Court: Oh, that is excellent.

Mr. Isserman: Exhibits 12 and 12-A, or, actually 12-A, which is part of 12 for identification; 13-A,

—Tr. Tr. 2075—

which is part of Exhibit 13 for identification; and Government's Exhibit 14. And the motion to strike these exhibits is based on the following grounds, that they bear on no issue in the indictment; they contain no proof of either conspiracy or of the advocacy charged; that possession, circulation and sale are protected by the First Amendment, by the guarantee of free speech in that amendment, and by the right of assembly and petition, including the right to engage in political activity guaranteed by that Amendment; that no foundation has been laid showing the circumstances under which these documents and contents were used and applied by defendants; that their introduction constitutes surprise, in that no bill of particulars was furnished, and that the reading of excerpts, as was done, was confusing and prejudicial.

The Court: Motion denied.

Mr. Isserman: I make the same objection to Government's Exhibit No. 15, which is a portion of the Daily Worker of June 16, 1945, using the same grounds but adding the fact that the matter contained therein was hearsay. It is a discussion—purports to be a discussion by the defendant Thompson.

The Court: Well, he is one of the alleged conspirators. June 16, 1945? I don't follow this at all,

—Tr. Tr. 2076—

but, anyway, motion denied.

Colloquy

Mr. Isserman: It is hearsay, and it could only be admissible on a relaxation of the hearsay evidence rule, one, if it would show conspiracy and, secondly, if, having showed conspiracy, it related to unlawful advocacy. It does neither, so it remains within the hearsay rule.

The Court: I have received all that proof, as you know, subject to my later instructions to the jury, and this is one of the alleged conspirators in the very period of the conspiracy.

Mr. Isserman: Yes, but it is matter which is unrelated.

The Court: But you move to strike anyway, I understand. Motion denied.

Mr. Isserman: I move to strike because it is unrelated to any conspiracy and unrelated to any unlawful advocacy.

The Court: I know, you deny the conspiracy.

Mr. Isserman: I not only deny it but this evidence does not bear on it and there has been no proof of it.

The Court: Well, I suppose there is no use discussing it with you because you have a different idea

—Tr. Tr. 2077—

of hearsay than I do; and there is a difference if what is said by one of the alleged conspirators in furtherance of the conspiracy is not admissible.

Mr. Isserman: Precisely.

The Court: If that is so, why, I don't know the law, that is all.

Mr. Isserman: My point is that it isn't in furtherance of the conspiracy, and that is why the hearsay rule applies.

The Court: That is where the difference of opinion comes in.

Mr. Isserman: There has been no establishment of conspiracy here at all.

The Court: Well, I said I would instruct the jury later about that, and I shall.

Mr. Isserman: In that connection I would like to ask your Honor to read the Jackson opinion because it did not deal solely with the evidence in the Krulewitch case but with—

The Court: I have read it. Maybe you wish to deny I have read it.

Mr. Isserman: Oh, no.

The Court: If you do, all right.

Mr. Isserman: I don't wish to deny it.

—Tr. Tr. 2078—

The Court: I say I have read it.

Mr. Isserman: Then I can only ask your Honor to consider it further in respect to this application.

The Court: Well, I really have been considering it about enough, I think.

Mr. Isserman: I now move to strike Government's Exhibit 16 which is a notice regarding a National Committee meeting of June 18, purportedly by John Williamson, on the ground that this notice is clearly protected by the First Amendment, that it relates to the calling of a meeting which is protected by the First Amendment to the United States Constitution, and it has no relevancy on any issue in this case.

The Court: Motion denied.

Colloquy

Mr. Isserman: I move to strike out Government's Exhibits No. 17, No. 19 and No. 20—

Mr. Gordon: Just a minute, excuse me. I would like to point out to the Court that, looking at the record at pages 1696 to 1698, when Government's Exhibit 19 was offered in evidence, it was passed to counsel, they examined it, and they offered no objection.

The Court: What about that, Mr. Isserman?

Mr. Isserman: Well, I will concede that whether or not we offered objection, this is an opportunity to call to the Court's attention the inadmissibility of this evidence, and therefore we ask to strike it.

—Tr. Tr. 2079—

The Court: Well, you know—

Mr. Isserman: It is precisely—you see, your Honor, we are in a double position when Mr. McGohey says we are repeating, and then Mr. Gordon says we are not repeating.

The Court: I know, that seems very interesting, but when an exhibit is offered and no objection is made and it is received, the Court generally gets the impression that there is no objection made to it.

Mr. Isserman: Well, after consideration, your Honor, we think it should be stricken.

The Court: You now decide—

Mr. Isserman: And we press our motion to strike.

The Court: —to object to it and you move to strike.

Mr. Isserman: Yes, on the ground that it is protected by the First Amendment to the United States Constitution.

The Court: Well, whatever effect your failure to object in the first place has, I won't pass on it now but I merely deny your motion.

Mr. Isserman: Was that now addressed to Government's Exhibit 16 alone? I think it was to that that Mr. Gordon rose. I meant to include in this motion, and therefore will move now to strike Ex-

—Tr. Tr. 2080—

hibits Nos. 17, 19 and 20 on the ground that they are not relevant to any issue covered in the indictment, and that they are expressions and manifestations of rights guaranteed under the First Amendment by way of free speech and free assembly and political action.

The Court: I think you mean 19-A and 20-A, because 19 and 20 were merely marked for identification.

Mr. Isserman: That is correct, your Honor.

The Court: Treating your motion as addressed to those exhibits, I deny it.

Mr. Isserman: I make the same motion with respect to Exhibits Nos. 21 and 22 dealing with convention issues and articles by Dennis, Williamson and Foster, parts of which were read into the record and to all references to these exhibits on the ground that they relate to no issue in the indictment and refer to activities protected by the First Amendment to the United States Constitution. They constitute neither admissions nor evidence of any conspiracy and do not fall within the exceptions of the hearsay rule.

The Court: How far down did you get—to 25?

Colloquy

Mr. Isserman: To 22. I could include 23, 24 and 25 in the same motion.

—Tr. Tr. 2081—

The Court: Now you mean, 21-A, 22-A, 23-A, 24-A and 25-A?

Mr. Isserman: Yes, I am referring to them.

The Court: The motion is made with reference to those exhibits and the motion is denied.

Mr. Isserman: My next motion to strike deals with the testimony of Mr. Budenz on page 1799 running through to 1809, in which Mr. Budenz was asked to give, and did purport to give, an explanation of the meaning of the first sentence of the constitution of the Communist Party. In this—in connection with this ground I wish to urge that no foundation has been laid for this testimony, that Mr. Budenz was called upon to decide the ultimate issue or testify on the ultimate issue in this case, and did so testify, and in that respect he invaded the province of the jury.

The Court: Well, what are these pages?

Mr. Isserman: 1799 to 1809.

The Court: 1799—just let me read there.

Mr. Isserman: I am referring to the first sentence of the preamble.

The Court: I know, to the constitution—I remember it very well, but I just want to see what was said about it here.

(After examining.) I will let it stand.

—Tr. Tr. 2082—

Mr. Isserman: I now move to strike out, your Honor, Mr. Budenz' testimony beginning on page

1809 of the transcript and running to page 1811 in which he characterized a portion of the preamble of the constitution of the Communist Party as Aesopian, and in that connection I move to strike the Government's Exhibit 27-A, which is the preface to a booklet called "Lenin's Imperialism", which is Government's Exhibit No. 27 for identification, and all testimony in reference thereto, and quotations read therefrom, on the ground that no foundation had been laid for the testimony of Mr. Budenz; on the second ground that it was hearsay as to the defendants and not binding upon them; on the third ground that the quotation was torn from context and misleading and confusing to the jury, and that the booklet itself, possession and circulation of the booklet was within—was protected by the guarantees of the First Amendment.

The Court: Motion denied.

Mr. Gladstein: Your Honor, could I ask you to reconsider the ruling made on that, and with the Court's permission interrupt Mr. Isserman—

The Court: No.

Mr. Gladstein: As to this point?

The Court: No. I have just read over about 10 or 15 pages or more of discussion in the minutes on

—Tr. Tr. 2083—

the same thing, and there was a good deal of discussion there and I have given it consideration and I am going to let it stand.

Mr. Gladstein: On this question of the interpretation by the witness of a provision in the constitution? I have something to suggest to your Honor

that I don't think you have perhaps considered—

The Court: Well—

Mr. Gladstein: '—and I regard it as fundamental, and I think your Honor ought to have a second look at this.

The Court: You know, Mr. Gladstein, if there was a little less persistence in stating that everything was fundamental, I would like to listen more, but you say every one of these things is so fundamental.

Mr. Gladstein: Some are more fundamental than others.

The Court: But I listened to them and most of them seem to me to be perfectly elementary propositions, that there is nothing in them, but, however, maybe this is going to be a case of something more fundamental than something else, so you tell me what is the point.

Mr. Gladstein: Well, you will recall that what happened there was that the witness was asked to identify the constitution of the Communist Party—

The Court: Now don't go and repeat it all. I

—Tr. Tr. 2084—

know what it is. There was certain language there that, when I read it, it looked a little peculiar to me, and I was wondering maybe there is more here than meets the eye, and then when he goes to explain he says they all understood that that was Aesopian business, it was a regular thing for the Communists to do. Now your clients will perhaps get up, when their time comes, and say "That is all wrong," but here is a man who says that they

deliberately got up this kind of double talk, and it seemed to me that the language was of such a character very often as to make it seem possibly at least that that was so, but, anyway, if that is what they did, it seems to me that it is admissible.

Mr. Gladstein: It seems to me your Honor is forgetting what the indictment charges. The indictment charges a conspiracy to advocate certain things. The document received in evidence upon motion of the Government, namely, the Constitution, says just the opposite of that. Then your Honor permits this witness to give his statement for the purpose of having the prosecution try to show that the defendants advocated not what they did advocate, which is plain for everybody to see, but just the opposite. Now my point is this—

The Court: Well, maybe they did that.

Mr. Gladstein: —the charge, the advocacy is

—Tr. Tr. 2085—

what is set forth in that document. That is what they advocate.

The Court: You see, Mr. Gladstein, if that were so, all a man who was in the course of committing a crime would have to do would be to put in a little statement, if it was a document, if it was part of the paraphernalia—put in a statement that this of course was not intended for such and such a purpose, and in that way he could escape a conviction.

Mr. Gladstein: Well, to whom was this being advocated, your Honor?

The Court: Well—

Colloquy

Mr. McGohey: I object to this line of argument, your Honor.

Mr. Gladstein: Isn't that a question? To whom was it being advocated?

Mr. McGohey: Your Honor, I object to that question. I don't think it is proper argument. Now we have started out here this morning—and, by the way, your Honor, I think the record ought to how show that since we have reconvened after recess the jury is no longer here.

The Court: Yes, it should so appear.

Mr. McGohey: While this argument has gone on.

The Court: Yes.

—Tr. Tr. 2086—

Mr. McGohey: But we have a situation here, your Honor, where every bit of the testimony of the first witness has been made the subject of a motion to strike, and every exhibit introduced by this witness has been the subject of a motion to strike.

The Court: No, they left out—

Mr. McGohey: Well, very nearly all.

The Court: They did not move to strike out 26, which was the constitution of the Communist Party of the United States of America.

Mr. McGohey: I see.

The Court: And they may have missed one or two others. I think that is the only one that they did not move to.

Mr. Isserman: But I have not finished.

Mr. McGohey: Now we are getting up—

The Court: Well, let me hear Mr. McGohey.

Colloquy

Mr. McGohey: We are getting back to the kind of argument that took up a great deal of time in the earlier days, in the earlier proceedings in this case where in the guise of argument counsel undertook to cross-examine the Court, to find out what the Court means about something and what the Court thinks about who is being advocated or what was advocated, and to whom was the advocacy made.

—Tr. Tr. 2087—

The Court: I don't mind that so much.

Mr. McGohey: Well, I am sure your Honor doesn't mind it but we have been here now since the 17th of January trying to get on with the case.

The Court: Yes.

Mr. McGohey: And my point goes to the fact that we are taking up a great deal of time upon matters which your Honor has given great consideration to. There was a long discussion and colloquy, as your Honor points out, at the time that this question was raised.

The Court: They keep saying that it is always something new, and then I listen and I must say it does not seem new, it seems like something I heard before; but you go ahead, Mr. Gladstein, and let me hear what you have to add. I am afraid that on this matter of this Aesopian language, seeing this whole literature permeated with jargon that is not intelligible to a person who isn't on the inside, it seems to me that it is perfectly admissible but maybe you can show me some reason why it isn't.

Mr. Gladstein: Well, you see this happens to be rather basic in the case at this point, and I hope that your Honor gives it some thought. Your Honor will recall that the charge in this case consists of

—Tr. Tr. 2088—

two things: one, an agreement which the indictment calls a conspiracy; and, two, to advocate something.

The Court: Yes, and don't forget the intent.

Mr. Gladstein: Well, the intent has to be shown, that is absolutely correct. Now the Government must therefore prove the agreement or the conspiracy, that is, the people get together and agreeing that they are going to advocate a particular thing.

The Court: Well, all the cases are against that.

Mr. Gladstein: Now wait.

The Court: They do not have to get together and agree.

Mr. Gladstein: Well, they have to—

The Court: You would never convict a conspirator in the world if you had to prove that they had all gotten together and agreed.

Mr. Gladstein: Well, I used that—

The Court: There is a multitude of cases—

Mr. Gladstein: I mean they must conspire together in the legal sense. Your Honor understood that, I trust.

The Court: No, I heard what you said, and it seems to me that it is just plain ordinarily bad law.

—Tr. Tr. 2089—

Mr. Gladstein: Well, let me state it in the way that I am satisfied, and I think your Honor will

agree, that the cases set it forth. The Government must prove that the defendants conspired, that is to say, they came in accord with each other and agreed to do something and take the next step. Now that next step is to advocate something, and the advocacy—the advocacy is here contained in the constitution of the Communist Party. Now what you have allowed Mr. Budenz to do is to then say "Oh no, that doesn't mean what it says. That means something t. opposite," but the defendants are entitled to have what they advocate in that constitution, taken exactly as it stands, because this witness—

The Court: There is no use, Mr. Gladstein; I am not going to grant your motion.

Mr. Gladstein: But don't you see—

The Court: I hear what you say, but, as I said before, if that were so, people could commit crimes with impugnity by always sticking in a clause to the effect that they were innocent.

Mr. Gladstein: Yes, and if the law were as your Honor is permitting it to be applied in this case, then consider what the opposite would be, namely, that you and I could get together and agree to sign

—Tr. Tr. 2090—

a document, to do something, to say something or to open a business, and somebody else would come in and say "Let me see that document."

"Oh, no, that doesn't mean open a business. That means rob a bank."

The Court: Who is that somebody else?

Mr. Gladstein: It doesn't matter who that somebody else is.

The Court: That is where we make the difference.

Mr. Gladstein: The document is the best evidence of what we advocate, and that constitution sets it forth.

The Court: Well, that is just bad law, Mr. Gladstein.

Mr. Gladstein: I submit it is not.

The Court: Well, you have instances of it in the fraud cases. You have instances of it in a multitude of other cases. If documents were always to be taken simply for what appears on their face, then wrongdoing, fraud, chicanery, criminal action of one kind or another, could always be consummated with impugnity because you could always have a document that looks all right.

Mr. Gladstein: But if you—

The Court: Let us not argue any more.

Mr. Gladstein: But if you and I agree—

The Court: Well, we don't agree.

—Tr. Tr. 2091—

Let me hear the rest of Mr. Isserman's motion.

Mr. Gladstein: Well, the net result of this is that what you are trying, when the Government puts in the constitution of the Communist Party and then gets this kind of interpretive, personal testimony—much of it hearsay, too, and conjectural and conclusionary as to what other people understand—you remember that, because you permitted Mr. Budenz to say how it was understood by others.

The Court: You remember I told you I did not want to hear any more argument.

Mr. Gladstein: Yes.

Colloquy

The Court: Well, I do not like people to say that I didn't say such a thing, but this time I do say it. Now I really don't want to hear any more discussion on this point, Mr. Gladstein.

Mr. Gladstein: Very well.

The Court: And I think we had better get back to Mr. Isserman.

Mr. Isserman: I do not know if the Court has ruled on my last motion to strike.

The Court: Well, I think it was the very one that Mr. Gladstein was supplementing your discussion on.

Mr. Isserman: I believe so.

The Court: And I deny that motion.

—Tr. Tr. 2092—

Mr. Isserman: Now if the Court please, I move to strike Mr. Bundez's testimony on pages 1822 to 1824 of the record, testimony relating to the constitution of the Comunist Party.

The Court: You move to strike Exhibit 26, which is the Constitution of the Communist Party?

Mr. Isserman: It is relating to Exhibit 26, and again being an interpretation by Mr. Budenz of the language of the Communist Constitution, on quoting democracy and the enemies of it.

The Court: So you do move to strike Exhibit 26?

Mr. Isserman: No, I am talking about the testimony relating to that exhibit.

The Court: Am I right, that you made no motion to strike Exhibit 26?

Mr. Isserman: That is correct.

The Court: That is what I thought. All right.

Colloquy

Mr. Isserman: But I am now talking about Mr. Budenz's testimony.

The Court: Yes, I know.

Mr. Isserman: On that, in interpreting the pledge to uphold democracy and to fight those who destroy it, on the ground that it is opinion evidence, it is highly prejudicial, no foundation laid for it, no qualifications were established, and that it invades the province of the jury.

—Tr. Tr. 2093—

The Court: Motion denied.

Mr. Isserman: I now move to strike Government's Exhibit 27 and the testimony relating to it appearing on page 1824 and the quotations read from it, between 1824 and 1836, being an article on Patriotism in Political Affairs. Now that might have been designated 27-A.

The Court: Yes.

Mr. Isserman: On the ground—

The Court: That is that—

Mr. Isserman: Article on Patriotism.

The Court: —that article of Lenin's called Imperialism, The Highest State of Capitalism, 27-A.

Mr. Isserman: No.

The Court: You haven't even got straight which ones you are moving to strike out.

Mr. Isserman: May I have just a minute, your Honor? (Examining.)

The Court: Well, you are going to move to strike them all. Why don't you just put two or three of them together?

Mr. Isserman: Well, I can't, your Honor, because they are on different grounds.

The Court: They sound kind of similar to me.

—Tr. Tr. 2094—

Mr. Isserman: All right, I withdraw my motion and now make a motion to strike Government's Exhibit 28.

The Court: 28-A.

Mr. Isserman: 28-A, which is an article on Patriotism appearing in Political Affairs issue of October 1945, to all references to that exhibit and to readings therefrom between pages 1824 and 1836, on the ground that the same is hearsay. The witness was not shown to have knowledge of the article, and it was not written by the defendants or by any defendant or by anyone responsible to the defendants. It was not relevant to any issue in this case and the circulation of that article is protected by the First Amendment to the United States Constitution.

—Tr. Tr. 2095—

The Court: Isn't that that Baltisky article?

Mr. Isserman: That is correct.

The Court: By the way, did those things come over from Moscow printed in English?

Mr. Isserman: I am not prepared to tell you.

Mr. Gordon: That is the testimony, your Honor.

Mr. Isserman: I don't know, but I did point out to your Honor that bringing that article in, which we deem irrelevant, opens the door again to the need for applying to this Court to take depositions in a foreign country, and in that respect—

The Court: I deny the motion.

Colloquy

Mr. Isserman: —in that respect I wish to add that the introduction of that article was a matter of unfair surprise to us, not having been mentioned in the indictment and no bill of particulars having been furnished.

The Court: Motion denied.

Mr. Isserman: I move to strike the testimony of Mr. Budenz from pages 1836 to 1841, in which he was called upon to explain a sentence in a paragraph in the preamble to the constitution, on the same grounds that I urged with respect to similar testimony of Mr. Budenz, interpreting the phrases of the constitution.

The Court: Motion denied.

—Tr. Tr. 2096—

Mr. Isserman: I move to strike the testimony of Mr. Budenz—

Mr. Gordon: Excuse me a moment. I wondered if that last motion included the comments by the defendant Dennis, when he called the witness names? Was that included in the motion to strike?

The Court: Does that have to do with it?

Mr. Isserman: I am talking about the testimony of Mr. Budenz. I think Mr. Gordon understood me. All right.

Mr. McCabe: Introducing a note of humor.

The Court: You may proceed then. Is that the place where Mr. Dennis made those remarks?

Mr. Gordon: Yes, your Honor, and most of it is pertaining to that. I am trying to follow the—

The Court: On those pages?

Mr. Gordon: Yes, sir. I am trying to follow Mr.—

Colloquy

The Court: You mean where he called Mr. Budenz a traitor and a—what were those other words he used?

Mr. McGohey: I think he mentioned Judas, Benedict Arnold and some other characters.

Mr. Gordon: That is what most of it is about.

The Court: I will strike that out.

Mr. Isserman: I am not moving to strike that out.

—Tr. Tr. 2097—

I am moving to strike out the testimony of Mr. Budenz that I have indicated.

The Court: Motion denied.

Mr. Isserman: If there is a desire to repeat what Mr. Dennis has said, it has been done.

Mr. Crockett: I think the record indicates that the Court has already ruled to strike out Mr. Dennis's comments.

The Court: Well, what of it?

Mr. Isserman: I now move to strike the testimony of Mr. Budenz between pages 1844 and 1845, relating to the structure of the Communist Party and other matters unrelated thereto in a period prior to the indictment on the grounds that there is no relevancy, no foundation was laid, and on the further ground that, in so far as this testimony related to the structure of the Communist Party, it related to the structure of a political party, and that all these matters are protected by the First Amendment and have no bearing on the issues of this case.

The Court: Motion denied.

You must be pretty near getting down to the bottom of the barrel.

Colloquy

Mr. Isserman: I am, I am gradually getting to the bottom. It has been a long barrel. Mr. Budenz was

—Tr. Tr. 2098—

on the stand—

The Court: All right, go along.

Mr. Isserman: —for a long period of time.

I move to strike Mr. Budenz's testimony on pages 1855 to 1866, dealing with the structure of the Party and certain alleged plans to go underground, alleged to have been promoted or suggested by Mr. Dennis in the winter of 1939 and 1940, and urge all the grounds that I urged with respect to my first motion to strike which I made this morning.

The Court: Motion denied.

Mr. McGohey: Pardon me. May I get the pages of that? Is that 1855 to 1866?

Mr. Isserman: 1855 to 1866, right.

Mr. McGohey: Thank you.

Mr. Isserman: I move to strike, on the same grounds, the testimony of Mr. Budenz found between pages 1871 and 1884 of the transcript pertaining to publishing of educational matters and to certain meetings in the period 1939 to 1940, on all the grounds mentioned in my first motion to strike made this morning.

The Court: Motion denied.

Mr. Isserman: I move to strike the testimony of Mr. Budenz between pages 1888, 1889 and 1890, on the ground that this testimony deals with publica-

—Tr. Tr. 2099—

tions in general and with educational matters, all of which have no relevancy to any issue in this case, and which are protected by the guarantees of the First Amendment.

The Court: Motion denied.

Mr. Gordon: Excuse me. In connection with Mr. McGohey's pointing out that the motions were identical with those made before, I direct your Honor's attention to the one just made. Mr. Isserman referred to pages 1888 to 1890, and at the bottom of page 1889, this is what he said, which is almost identical with the language he just used—

The Court: It is that little difference that he relies on. He says it is entirely different. It may be just one word or two words, but I cannot stop to check up each time to see whether there is a word or two different.

Mr. Isserman: If the one or two words embrace another legal point, and if it should be repetitious, then I ask your Honor to reconsider your ruling. I am trying to call your Honor's attention—

The Court: Mr. Isserman, if you think I am curtailing you, that I am preventing you, you are wrong. I am not.

Mr. Isserman: I haven't said anything about that, your Honor. Your Honor keeps repeating it for no

—Tr. Tr. 2100—

purpose that I understand.

The Court: Go ahead. Very well. You do seem to like to argue. I never saw anything like it.

Mr. Isserman: I would like to proceed, if I can.

The Court: Proceed with the rest of the motion.

Mr. Isserman: May I proceed now?

The Court: Yes, you may.

Mr. Isserman: I move to strike the testimony between pages 1897 and 1904, referring to an alleged

review commission, on the ground that it is immaterial, has no relevancy to any issue in this case, is designed to create prejudice, and is a matter of unfair surprise to the defendants, not having been alleged in the indictment or furnished by the bill of particulars which was requested.

The Court: Denied.

Mr. Isserman: I move to strike the statements by Mr. Gordon on page 1908 of the transcript, which purport to be a summary of Foundations of Leninism as being highly misleading, prejudicial and improper.

The Court: Well, let us see what page those highly prejudicial and improper remarks are on.

Mr. Isserman: They are improper in that—

The Court: What page? What page?

Mr. Isserman: 1908, your Honor.

—Tr. Tr. 2101—

The Court: Just let me look at it and then I can probably tell without too much argument. Nineteen hundred and what?

Mr. Isserman: And 8.

I might add to this—

The Court: Let me read it, if it is possible. It is just—

Mr. Isserman: I would like to add another ground before your Honor rules.

The Court: Well, if that is highly prejudicial, I am an Eskimo.

Mr. Isserman: What did your Honor say? May I get that remark?

The Court: I deny the motion.

Colloquy

Mr. Isserman: Your Honor, your Honor was suggesting that I was trying to interrupt your Honor, and I wanted to suggest another ground, and when I do wait, then your Honor rules without allowing me to state my ground. May I state an additional ground?

The Court: You move to strike my comment about the Eskimo?

Mr. Isserman: No, I didn't hear what it was. I didn't know whether it was about an Eskimo or an Iroquois.

The Court: It wasn't important.

Mr. Isserman: My additional ground, which I

—Tr. Tr. 2102—

intended to state before your Honor ruled, was that, in effect, Mr. Gordon testified as an expert, he wasn't under oath, and no foundation was laid to qualify him as an expert, and also that the document itself is the best evidence.

Mr. Gordon: May I point out to your Honor that I was merely making a legal argument in answer to Mr. Sacher's argument, and that thereafter this document, which Mr. Isserman says is the best evidence, I read from.

The Court: I know; how that can be so important, I just don't understand. Anyway, the motion is denied.

Mr. Isserman: I now move to strike the testimony of Mr. Budenz on pages 1914 and 1915 of the record with respect to his definition of renegade. No foundation was laid for Mr. Budenz' competency to define this term. And in this connection I also move to

strike on the ground that the best evidence of differences between Kautsky and Lenin, which Mr. Budenz testified about, are contained in the writings of these gentlemen and not from Mr. Budenz, who is no expert on the subject.

The Court: Motion denied.

Mr. Isserman: Also, it is a matter of surprise, of unfair surprise, to the defendants, not having been

—Tr. Tr. 2103—

mentioned in the indictment.

Page 1919 of the testimony, I move to strike Mr. Budenz' alleged explanations of the meaning of the constitution on the same grounds that I have urged in connection with his other interpretation of language of the constitution and the preamble.

The Court: Motion denied.

Mr. Isserman: And I am referring to the Constitution of the Communist Party, which is in evidence.

I move to strike Government's Exhibit No. 25, which is the constitution and by-laws of the—

The Court: Do you suppose you could sort of lump some of them together now? Because I want to get the jury back here and have us proceed before we go out to lunch. I should think—

Mr. Isserman: I have a few more pages, your Honor.

The Court: I should think after an hour or so of this that you could, perhaps, sort of put a little general conclusion to cover all the rest.

Mr. Isserman: There are documents and testimony. I am trying to bring them together.

Colloquy

The Court: You see, you covered all the documents, so that there is none of them left.

—Tr. Tr. 2104—

Mr. Isserman: I am now referring to a document which is Government's Exhibit 29 which I haven't covered, your Honor.

The Court: Did you miss that?

Mr. Isserman: I haven't missed it; I am referring to it now.

The Court: I will give you just until a quarter of one to continue this and I am going to bring the jury back. I find when you get going you have no terminal facilities.

Mr. Isserman: I don't know what your Honor means by my not having any terminal facilities. Except for the interruptions by Mr. McGohey and the interrogation by the Court I have been going as fast as I can.

The Court: You are going to be permitted to continue until a quarter of one.

Mr. Isserman: I will continue as fast as I can with the rest of the matter.

The Court: Probably have a hard time stringing it along.

Mr. Isserman: Your Honor seems to be preventing me from continuing. May I proceed?

I move to strike Government's Exhibit 29 on the ground that it relates to a period prior to the time covered by the indictment, that it is not related to

—Tr. Tr. 2105—

any issue in the indictment, that it is protected, that its possession and circulation is protected by the

First Amendment, that it relates to political activities which are guaranteed by the First Amendment, and that it contains references to an organization with which the Communist Party was not affiliated for a number of years prior to the time in the indictment, and which itself had been dissolved prior to any period in the indictment, namely, the Communist International, and that references thereto under these circumstances are prejudicial to the defendants.

The Court: Motion denied.

Mr. Isserman: I move to strike the testimony of Mr. Budenz on page 1938 to page 1940 of the transcript relating to some alleged going underground by Williamson on the ground it is hearsay, that it antedated the indictment, it was a conclusion not based on facts disclosed in evidence, and had no relevance to any issue in the indictment and was prejudicial to the defendants.

The Court: Motion denied.

Mr. Isserman: I move to strike the testimony on pages 1941 and 1943 and 1946 of the record relating, respectively, to—relating to the testimony of the witness as to when he met Stachel, Davis, Winston and Stachel, as to when he met Irving Potash, on the ground that this testimony is remote and im-

—Tr. Tr. 2106—

material and has no bearing on any issue in the case and it was prejudicial to the defendants.

The Court: Motion denied.

Mr. Isserman: I move to strike Government's Exhibit 30, "History of the Communist Party of the Soviet Union," on all the grounds urged in connec-

tion with my first motion to strike, that it does not relate to any issue in the indictment, that it is a book of historical facts, that its possession and circulation is protected by the First Amendment, and that the reading of the excerpts therefrom in the manner done was highly prejudicial to the defendants.

The Court: Motion denied.

Now I will treat your motion as having been made to all the balance of Mr. Budenz's testimony page by page and answer by answer, and also Exhibits 31-A, 32 and 33, severally and together upon all the grounds that you have mentioned in support of all the motions made heretofore this morning, and I will deny them all.

(To bailiff) Now call in the jury.

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—Tr. Tr. 2136—

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Mr. Gladstein: Your ruling prevented me from reading certain portions of this book which this witness vouched for the truth of.

The Court: I don't want any argument before the jury, Mr. Gladstein.

Mr. Gladstein: I take exception to the ruling, your Honor.

The Court: That is all right. The time for argument is in the summation.

Mr. Gladstein: And the time for contradictory statements of a witness is during the cross-examination.

The Court: Yes, and I consider that remark im-

—Tr. Tr. 2137—

pertinent. I have ruled both of those statements inadmissible. You will please refrain from such comments in the future.

Mr. McGohey: I move to strike the comment, your Honor.

The Court: Strike it out.

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—Tr. Tr. 2294—

New York, April 4, 1949

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Q. Isn't it a fact, Mr. Budenz, that the cause of that strike was publicly stated by Senator Barkley, now the Vice President—

Mr. McGohey: I object.

Mr. Gladstein: May I finish?

The Court: You are putting proof in in your questions. You put all the answers in.

Mr. Gladstein: That is exactly what cross-examination is—the direction of a particular point to the attention of a witness and the request that he answer it truthfully yes or no.

The Court: Sometimes, but when the Court has indicated that a certain line of questioning is not proper and then counsel proceeds to formulate questions with all the answers that he wants in the ques-

—Tr. Tr. 2295—

tions it makes a little different situation.

Mr. Gladstein: Well, I will reframe the question.

Q. Did the then Senator Barkley, who is now the Vice President of the United States, publicly express himself concerning the Allis Chalmers Company's poor labor record?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Do you know that there was an Office of Production Management in existence at that time? Do you know that? A. I think there was, yes, sir.

Q. Now there was also of course a Conciliation Service connected with the United States Department of Labor, is that correct? A. That is a well known Service.

Q. Did the Conciliation Office and the Office of Production Management intervene in that dispute in an effort to settle it?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you learn whether that was so?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did the Office of Production Management and the Conciliation Service make a proposal to the company and the union to settle the dispute?

—Tr. Tr. 2296—

Mr. McGohey: Objection.
The Court: Sustained.

Budenz—Cross
Colloquy

Q. Did the members of the union accept a proposal of settlement from the representative agencies of the United States Government which however was turned down by the company?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. McGohey: Now if the Court please, I must now argue an objection to this line of questioning because we are getting back to just the vice your Honor pointed out—the questions purport to give a history of a controversy between the Allis Chalmers people and the union, whatever it was, in the form of the question.

I take the position that what happened in the settlement of that strike is not an issue in this case.

The Court: That is right.

Mr. McGohey: And secondly that the form of these questions designed to put that all in evidence is improper and the Court has warned counsel about if and I now object to the whole line.

The Court: Yes. Mr. Gladstein, you will please turn to something else.

Mr. Gladstein: May I say, your Honor, that unless I am permitted to negate this witness's claim

—Tr. Tr. 2297—

that a particular conversation took a particular turn, that certain things were said—unless I am permitted to negate that point showing what the facts were concerning that controversy then your Honor is making it impossible for me to show—

The Court: Well—

Mr. Gladstein: May I finish?

The Court: Your persistence in this case—

Mr. Gladstein: Your Honor, will you let me finish?

The Court: —would make it necessary to let the jury retire every time you hold forth on something.

Mr. Gladstein: I am not seeking that.

The Court: You seem to fail to realize that I have a reasonable amount of intelligence. I have followed what you have been doing here and I have sustained a variety of objections and I tell you now to turn now to another subject. Instead you go on arguing about the same thing and you must know that when a lawyer does that the only inference to a reasonable person is that he is trying to leave the impression that maybe these questions represent the truth whereas I ruled them out.

Mr. Gladstein: They do represent the truth and I intend to show that they do. Let me put it this way—

—Tr. Tr. 2298—

The Court: You don't put it any more ways. You go on to something else.

Mr. Gladstein: May I be heard in regard to this line of questions?

The Court: No, I don't want to hear any more about it. It is very clear to me now.

By Mr. Gladstein:

Q. You have already testified that you wrote an article about that strike. A. No, sir.

Budenz—Cross
Colloquy

Q. You so testified a few minutes ago. A. I have written articles about the Allis Chalmers strike.

Mr. McGohey: Keep your voice up, Mr. Budenz.

Q. Now I call your attention to an issue of the Daily Worker of Friday March 28, 1941; and direct your attention to page 4 of that newspaper and ask you to state, if you can, identify on that page—be careful of the paper, will you, Mr. Budenz; it is almost falling apart—an article written by you on the Allis Chalmers dispute? A. No, sir, not firsthand on the Allis Chalmers dispute.

—Tr. Tr. 2299—

Q. Well, is it your article? A. Yes, it is my article.

Q. All right.

The Court: What do you mean it isn't "firsthand," Mr. Budenz?

The Witness: It doesn't deal with the Allis Chalmers strike. It deals—

The Court: You mean you don't write as a person who has observed those facts personally?

The Witness: That is right.

The Court: That is what you mean?

The Witness: Yes. I wrote it as a sort of editorial, I would say.

The Court: Yes.

Q. What is the headline? A. "Secretary"—

Mr. McGohey: Now, if your Honor please, I object to that until I have a chance to look at it.

The Court: Sustained.

Mr. McGohey: Because it is clearly along the same lines to which I have objected.

(Mr. Gladstein hands to Mr. McGohey.)

Mr. McGohey: Clearly, I am going to object to any reading of that. That is precisely along the lines of what your Honor has said may not be examined about.

Mr. Gladstein: Surely, your Honor, I am permit-

—Tr. Tr. 2300—

ted to have the document identified.

The Court: Oh, yes.

Mr. McGohey: Oh, I am not objecting to that. I am objecting to the reading of it prior to its admission.

The Court: It is getting in indirectly what I have repeatedly excluded.

Mr. McGohey: That is right, and which on its face, your Honor, by the very words itself shows that it is hearsay, what somebody else, not connected with it, said.

Mr. Gladstein: I asked for the headline to identify it.

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—Tr. Tr. 2335—

Mr. Gladstein: There are a number of these which I would like your Honor to look over—

The Court: Well—

Mr. Gladstein: No, not all at one time.

The Court: I am afraid this is the last time that I am going to read through from start to finish. If

you cannot show me the parts that you think are inconsistent—

Mr. Gladstein: Well, the whole thing is inconsistent and negates—

The Court: Well, that statement I will just not—I was up to the middle of the (examining) eighth column, and I don't desire to read any more. I could see what your view is, and the papers are excluded.

Mr. Gladstein: May I make an argument for the record as to the object of those documents? I think I should be permitted to do that.

The Court: You have already made a good deal of argument, Mr. Gladstein.

Now I see that your friends are rising, so let us hear what Mr. Isserman has to say.

Mr. Isserman: If the Court please, I would like to ask your Honor to reconsider your Honor's ruling—

—Tr. Tr. 2336—

The Court: No.

Mr. Isserman: On the ground that—

The Court: No, I am not going to reconsider it and I do not want to hear any argument on it.

Mr. Isserman: On the ground that I have had no opportunity to be heard. There are other and important reasons why these articles should be admitted, and I would like to argue that before your Honor. Your Honor might excuse the jury and we can argue the matter then.

The Court: No, I do not think I desire any more argument.

Budenz—Cross
Colloquy

You know, I had an exhibition from you the other day that will long rest in my memory. You insisted that you had to go on, something like an hour and a half on something that could have been done in five minutes, repeating and renewing the objections that had already been made, and I am just not going to sit here and have this go on month after month. I just won't do it.

Mr. Isserman: Well, I would respectfully like to object to your Honor's remarks and I would like to have some opportunity to state the grounds on which, on behalf of my clients, I believe this evidence should be admitted. If the Court does not prefer argument I will merely state the grounds but I would like to have that opportunity.

The Court: Well, I see your point, that you

—Tr. Tr. 2337—

think you can, by telling the grounds, get the argument in that way, is that it?

Mr. Isserman: No. I can get my points in but I would like to argue them with reference to the record on those points, but if the Court rules I may not, I will merely state my grounds.

The Court: I do not desire to hear anything on it now, Mr. Isserman.

Mr. Isserman: Well, may I state my grounds, if the Court please?

The Court: All right, the jury may be excluded. You may retire.

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—Tr. Tr. 2340—

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The Court: Now I rule in view—

Mr. Gladstein: Your Honor, could I say something?

The Court: —in view of what has been going on here and the various objections raised, I now rule, and I feel that I am compelled to so rule if the trial is ever to end, that from now on, on matters of evi-

—Tr. Tr. 2341—

dence—and this applies to both sides, to the Government and to the defense counsel as well—that if an objection is raised to evidence they shall merely say they object period, and if the Court desires argument or statement of grounds, the argument or statement of grounds can be made, and not otherwise.

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—Tr. Tr. 2342—

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The Court: Well, this is the last argument that I am going to hear from either side without asking for it. We will never be through. The jury will be

—Tr. Tr. 2343—

excused and we go on and on by the hour. There is no way to stop you people, no way to stop you without using means I do not care to employ.

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—Tr. Tr. 2346—

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Mr. Isserman: Now if the Court please, I would like to object to your Honor's ruling that counsel

will not be allowed to state the grounds of objection for the balance of this trial.

The Court: Without the request of the Court.

Mr. Isserman: All the cases require that the grounds be stated.

The Court: But when counsel exceed the bounds of propriety and persist day in and day out and week in and week out, month in and month out, something has got to be done to put terminal facilities to the case and unless I do that, why, we would never be through. Every time you get up you say you are not going to make an argument; you are merely going to state the grounds. And then you go ahead and make an argument. I think the record will bear me out. And you are not the only one. It has been done by—I think Mr. McCabe and Mr. Crockett have been a little bit more sparing in their words, but the rest of you have held forth at great length and I

—Tr. Tr. 2347—

have no other alternative than to make the ruling I just made.

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—Tr. Tr. 2350—

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The Court: Let me tell you something, Mr. Sacher, in every stage of this case I have been forced with the utmost reluctance and regret to do something to stop the processes of delay and confusion. I have had to do it again and again. Now you ought to know by now that when I start doing that I do it, and I may have to use some other steps besides the

one that I have started to use. If you have any notion that this trial is going to go on for years and that we are going to hear all these books read and all these things besides the point, I might just as well let you know now, it is not going to happen.

Mr. Sacher: Your Honor, it does not serve the purpose of the defendants to obscure anything. On the contrary—

The Court: I can't forget what happened on this challenge to the jury, how you people had me fooled on that. I thought you were going to bring something out any day and I found after three or four weeks passed that it was one big colossal bluff.

Mr. Sacher: Why don't we just let the dead bury

—Tr. Tr. 2351—

the dead?

. . . . . .

—Tr. Tr. 2364—

. . . . . .

The Court: Objection sustained. I find nothing there inconsistent with what the witness has testified.

Mr. Gladstein: In view of your Honor's statement that you find nothing inconsistent, the purpose of this is to show that everything that appeared did not advocate force and violence. If your Honor—

The Court: Mr. Gladstein—

Mr. Gladstein: Yes, but too many things—

The Court: —I don't desire argument.

Mr. Gladstein: No, I didn't want to argue.

The Court: What is it you are doing?

Mr. Gladstein: I am going to ask you a question, if I may.

The Court: Well, I don't think you may this time. Just go ahead.

Mr. Gladstein: There is no point in my offering other papers if your Honor's ruling is that the only thing you will receive is something—

The Court: It must take you a very long time to have a thought penetrate. I have interrogated you at such length this morning to see if there was something in these papers that you claimed to be incon-

—Tr. Tr. 2365—

sistent with the testimony given by the witness, and we seem to get nowhere, and paper after paper was used, and now, when I say again that I see nothing inconsistent with the testimony of the witness, you affect surprise and seem disposed to catechize me on the subject. I think my ruling is clear.

Mr. Gladstein: Well, I wish to renounce any intention to catechize. I submit—

The Court: You said you wanted to ask me a question, and I thought that was a form of catechizing.

Mr. Gladstein: No, I simply wanted—

The Court: Well, please go on with your next question. Let's stop fooling around.

Mr. Crockett: If the Court please, I move to strike from the Court's rulings those words "I find nothing inconsistent in this statement," as tending

undoubtedly to prejudice the jury against the case of the defendants and thus to that extent constituting a denial of due process to my client.

The Court: Motion denied.

Mr. Gladstein: May I say for the record that, in view of your Honor's ruling concerning the articles that I have shown to this witness, I will cease identifying and offering in evidence articles written by this witness dealing with various portions of Marxist-Leninist literature, upon the grounds that your Honor will not receive any of these in evidence.

—Tr. Tr. 2366—

The Court: Well, when you have articles such as those that you have just offered, it is highly probable that my rulings will be the same.

Mr. Gladstein: May I—

The Court: If you have others that are relevant and competent, you had better offer them and take my ruling.

Mr. Gladstein: Of course, if the only article I can show you is one which shows force and violence, I will never produce such an article because none was written.

Mr. McGohey: I move to strike that, if your Honor please.

The Court: Well, it is relatively innocuous. I don't like this business of striking things out, but I tell you now, Mr. Gladstein, that what I say is provoked by your comment: when you have literature by this witness which covers everything under the sun that may be deemed a grievance by anybody, of young people because they are not given positions of

responsibility, women because they are not given positions of men, colored people because they are excluded from this and that in certain parts of the country, the Jews because they are not treated, in their opinion, the same as other people, and so on down the line, I am going to make the same ruling that I have made here, you see, that that has no

—Tr. Tr. 2367—

bearing on what this witness has testified at all, and I am going to rule it out.

Mr. Gladstein: That is just the point your Honor exactly misses, that the whole body of Marxist Socialism is directed to and based upon the very things your Honor has listed.

The Court: Perhaps. It seems so. But this is a prosecution of these defendants, not of America as a whole or its various parts.

Mr. Gladstein: This is not a question of America. It is a question of—

The Court: We are going to litigate here whether these defendants are guilty of the crime charged. We are not going to litigate all various kinds of grievances that anybody of one kind or another may have throughout the country, and you may just as well eliminate those things as to the cross-examination of this witness because it seems to me they have no bearing upon his testimony.

Mr. Gladstein: But the defendants are charged with advocating the doctrines of Marxism.

The Court: You see, we never reach an end, Mr. Gladstein. You always will have the last word.

—Tr. Tr. 2368—

Mr. Crockett: If your Honor please, I wish to object to the Court's characterization of articles which have only been marked for identification and which the Court in its discretion has decided not to admit into evidence.

The Court: Well, I did leave out a few things in my reference to it. There are many other alleged grievances, such as the poor against the rich and so on and so forth. I didn't attempt to enumerate them all. However, your motion is denied.

Mr. Gladstein: I would like to state the grounds on which I offer all these exhibits.

The Court: I think it is a curious thing, a little while ago it was grounds for objection; now it gets to be grounds for an offer. If an offer doesn't speak for itself I don't see why not. Anyway I don't want to hear any more argument right now.

Mr. Gladstein: Am I to construe your Honor's statement as a ruling that I may not express the grounds on which I make the offer?

The Court: If you haven't already expressed the grounds on which the exhibits are offered—you see, we let the jury retire this morning and I heard sufficient argument to require me, as I felt, to make a ruling that in the future we are to have a new way of proceeding and I am going to follow that new

—Tr. Tr. 2369—

way of proceeding, and I am not going to hear any argument unless I ask for it and this is one time when I am not asking for it.

Mr. Gladstein: I simply ask your Honor if that is your ruling. May I have the record so show?

Budenz—Cross.
Colloquy

The Court: You have the last word.

Mr. Gladstein: I object to your Honor's failure to make a ruling.

The Court: The record does show. How many times has a man got to repeat something for it to appear on the record?

* * * * *

—Tr. Tr. 2431—

New York, April 5, 1949

Q. Did you receive any money for doing any work for Congressman J. Parnell Thomas along the same lines of your testimony here?

Mr. McGohey: Objection.

The Court: Sustained.

Q. During the years you were in the Communist Party—

The Court: How does it affect a man's credibility, that he gave the same testimony on a number of other occasions?

Mr. Gladstein: I object to any comment—

The Court: All right.

Mr. Gladstein: —by the Court.

The Court: I see. Then we won't enter into it.

Mr. Gladstein: I assign your Honor's remarks as misconduct.

The Court: If you think my ruling of yesterday prevents you answering a question from the Court, then I will simply let the matter drop there. My rul-

—Tr. Tr. 2432—

ing was that there was to be no argument unless I requested it. When I request it I expect to be answered and answered respectfully, but, however, we will let it drop.

Mr. Gladstein: Your Honor, I am allowed, am I not, to assign as misconduct remarks of the Court that, as a lawyer, I think constitute misconduct?

The Court: You may attack me all you want.

Mr. Gladstein: That is not what I said.

The Court: You may claim that I have been guilty of judicial misconduct of every name, nature and description, that is your right—and I shall take no offense at it.

Mr. Gladstein: I object to the Court's remarks and assign the Court's last remark as misconduct.

The Court: Very well.

Mr. Gladstein: And I ask that the jury—

The Court: Your objection is noted.

Mr. Gladstein: I ask that the jury be advised to disregard the Court's comments.

The Court: I shall make no such direction. Why should I tell them that? You objected to my judicial conduct, as you have done repeatedly before, and your objection is noted.

* * * * * *

—Tr. Tr. 2437—

Q. You said here, and let me show it to you, Mr. Budenz.

—Tr. Tr. 2438—

I show you page 2193 of the transcript and ask you, "Did

you testify as follows:" "Q. When did you decide, and here I am asking for a date, to leave the Communist Party?" Do you see that question there? A. Yes, sir.

Q. And did you answer, "Well, you cannot make it on a date"? Did you give that answer? A. That is correct.

Q. Then were you asked, "Q. When did you reach the decision in your own mind that you were going to leave? Can't you give us a date? A. I decided by degrees as everyone decides by degrees to do things"? Did you give that answer? A. That is correct.

Q. Then were you asked the following question, "Q. When did you reach the decision? A. I reached first the decision to return to the Catholic Church in January"? Did you give that answer? A. Yes.

Q. Did you, yes or no? A. But I was interrupted and, in addition, counselor, that was the decision to move—

Mr. Sacher: I object to this, your Honor.

The Court: Mr. Sacher, you can object your head off but what he says is absolutely right. It is an unfinished sentence. It is what I said before. The record shows it is an unfinished sentence, and that the witness was interrupted.

—Tr. Tr. 2439—

Mr. Sacher: But the word "first" appears long before he was interrupted.

The Court: Perhaps.

Mr. Sacher: He says, "I reached first the decision to return to the Catholic Church in January."

Philbrick—Direct
Colloquy

The Court: Mr. Sacher, if you are trying to indicate to the jurors you desire that they disregard my instructions and follow you, you are stepping on dangerous ground and you had better stop it.

* * * * * *

—Tr. Tr. 2657—

New York, April 6, 1949

Q. Was there any procedure adopted for those persons indicating that they wished to speak? A. Yes, before you could speak you had to write out your name on a card. The card was sent to the front of the room, to the chairman conducting the meeting, and in that way, you see, they could select the names of those who they wished to have speak.

Mr. Crockett: I move to strike out the last remark

—Tr. Tr. 2658—

of the witness.

Mr. McCabe: I object.

The Court: Did they do that?

The Witness: Yes, sir.

The Court: All right, allowed.

Mr. Isserman: I object to the question and answer, and ask that the answer be stricken.

The Court: Well, I will strike out the part that they could do it and leave in the part that they did it.

Mr. Sacher: That is a pyrrhic victory, your Honor.

The Court: It seemed to me not to be very much substance in the objection.

Q. Now, from what you have said—

Mr. Isserman: I would like to object to the Court's remark as to the character of the objection. The objection to your Honor's question was well taken because it called for—it suggested the answer, it was a leading question, if the Court please, and, beyond that, it called for a—the answer, which was given, as hearsay. The Court said, did they do it, without saying who and where and what was said. I object to the Court's characterization of the objection.

—Tr. Tr. 2659—

The Court: Very well. Overruled.

Mr. Gordon: I am having a hard time keeping my mind on the question.

What did I start to say, Mr. Reporter?

The Court: I think I remember what he has been talking about all right. We are up to the point where he has described sending these cards up, and then the man who was the chairman, he picked around and picked which ones he wanted to call on and he called on those.

Isn't that it, Mr. Witness?

The Witness: That is true, sir.

Mr. Sacher: I object to that and move to strike out your Honor's attempted summarization of the testimony as not being correct and as not being what this witness said.

The Court: This time I would like to hear you at length, Mr. Sacher. What is the difference be-

tween the way I summarized it and the way the witness testified?

Do you care to answer the Court's question?

Mr. Sacher: Yes, your Honor. I think your Honor clearly put the answer of the witness right in his mouth and put it there—

The Court: Your objection was that I had stated it differently from the way it was testified by the witness.

—Tr. Tr. 2660—

Mr. Sacher: Yes.

The Court: What is the difference?

Mr. Sacher: Well, I think if we just read it—I don't want to commence to quote your Honor and find I have muffed a word, but your Honor said the chairman picked whomever he wanted, et cetera, and then the witness said yes, and I say that that was not the testimony as previously given.

The Court: All right, we will have it read back.

(To reporter) Read back what the witness said about that.

Mr. Crockett: If the Court please, I object to this entire procedure and should like to state the reasons.

The Court: I will sustain the objection and we won't read it.

Mr. Crockett: My objection also—

The Court: I rather suspected you were going to do that, so it is all right.

Mr. Crockett: My objection also goes to the Court's persistence in summarizing the testimony of witnesses and thus giving the impression that more im-

portance should be attached to that testimony than ordinarily or otherwise might be attached to it.

—Tr. Tr. 2661—

The Court: All right. Go ahead. Now we won't have the question read, so you ask the next question.

* * * * *

—Tr. Tr. 2664—

Q. Now, Mr. Philbrick, on this literature table at the convention were there books by Marx and Engels? A. Yes, there were.

Mr. Crockett: I object.

Mr. Gordon: I think there was an objection.

The Court: Oh, I did not hear that. Nobody rose.

Mr. Crockett: Well, I object to the question being leading.

The Court: It is leading and if I had heard the objection I would have sustained it. I will strike out the answer.

—Tr. Tr. 2665—

He hasn't yet exhausted his recollection as to what was on the table. If he had done that I would permit some reference to some specific matters but I think his recollection should first be exhausted.

Mr. Crockett: I must object to that statement, your Honor, as suggesting to Mr. Gordon how he can get what he seems to be troubled about getting out of this witness.

The Court: Mr. Crockett, it is the function of the Court here to administer justice which I am trying to do to the best of my ability. Now you must know that such comment as you just made is not right.

Mr. Crockett: But I think the Court appreciates the fact—

The Court: Now I have been standing for all kinds of picking on me by the lawyers for the defense here and I am not going to raise any great issue about this one, but I really—I really think if it gets to a point where the Judge may not indicate what he thinks is the proper thing to do, it has reached a strange and pitiful state of affairs.

Mr. Crockett: I wish to disclaim any intent to pick on your Honor, but I think it was pretty obvious that Mr. Gordon was puzzled how to get from the witness what he wanted and the Court suggested that if the witness had established that he had ex-

—Tr. Tr. 2666—

hausted his recollection.

The Court: You see, the intimation in what you say is that I am sugesting it from some improper motive, not from the motive of doing justice but of taking sides in the controversy, which I do not do, and I really don't think there is any basis for your making such an insinuation, and that is why I comment on it.

Mr. Crocket: I had no intention of impugning your Honor's motives. I simply object to the Court making such a suggestion at that time.

The Court: All right. I made the suggestion, if you call it such—I didn't think of it in that light but however it may be, on numerous occasions here I have explained to counsel for the defendants when I thought it proper to do so, why I sustained certain objections and how the questions could be reframed.

I really do not see why I should not do that. I think it is proper to do it.

. . . . . .

—Tr. Tr. 2699—

New York, April 7, 1949

. . . . . .

The Court: I am inclined to think you raised the question, particularly yesterday, but you remember I have ruled that counsel is to merely say "I object", unless the Court requested a statement of the reasons. I don't want to keep saying that or to appear to be unpleasant about it. I felt that I had to make

—Tr. Tr. 2700—

such a ruling and I hope counsel will bear it in mind.

Mr. Isserman: If the Court please, I would like to object and request the Court to be allowed to state my reasons.

The Court: You see, Mr. Isserman, you have said that several times. I don't want to again reiterate the reasons why I felt impelled to make such a ruling. But I did feel that I had no alternative and it is my ruling. Your objection is noted.

. . . . . .

—Tr. Tr. 2813—

. . . . . .

Mr. Sacher: I object to this on the ground it is irrelevant, incompetent and immaterial, and I respectfuly submit that if this witness is going just to name people who were in his group then all he is doing is

now acting in fingering people, and since that has no relevancy of any kind to the case on trial, I think it ought to be excluded.

The Court: Now Mr. Sacher, do you remember a little direction that I have given, not once, not twice, but a number of times, that when a lawyer either for the prosecution or for the defense wants to object he

—Tr. Tr. 2814—

was to merely say "I object" and not argue unless I requested it?

* * * * *

—Tr. Tr. 2818—

New York, April 8, 1949

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Mr. Sacher: I object.

Mr. Gladstein: An objection was made to this general question yesterday. I would like to call your Honor's attention to the fact that unless it is claimed that one or another of the defendants was present

—Tr. Tr. 2819—

speaking on this occasion, or unless there is established a good deal more than any pretense of foundation so far, this is prejudicial, immaterial, and simply means that some persons outside this court may suffer some economic or other reprisals. I suggest that your Honor reconsider this objection of mine because the value, if any—and I put the word "value" in quotes—of this testimony that is sought to be elicited, unless there is a claim that

one of the defendants was there speaking is highly prejudicial,

The Court: I see no necessity in the case of a conspiracy charge such as this of having the physical presence of each of the defendants on each occasion. It depends on the way in which the proof connects up. And I have already indicated that I shall charge the jury fully on that and I shall adhere to my ruling made yesterday. I overrule the objection.

Mr. Sacher: If the Court please, my recollection is that yesterday at the close of the session the witness testified that such discussion as took place in regard to Exhibit 46 for identification was led by so-called members of the group and that there were no teachers as such. I think that is the testimony, your Honor. And the question now is addressed to teachers.

The Court: Well, I think if there were individuals

—Tr. Tr. 2820—

who were teaching there it is admissible and I so allow him to proceed.

Mr. Sacher: May I call to your Honor's attention the testimony at page 2813.

The Court: I remember the portion you refer to. I remember that.

Mr. McCabe: Your Honor, I would like to make the further objection that the fall of 1947 is indefinite and permits testimony to come in without specifying the time in order to enable the defendants, if they care to, to meet that in a way provided by law.

The Court: Well, Mr. McCabe, I really am puzzled as to what I should do here. Now I have given repeated instructions that counsel should not argue objections to evidence, and yet no one pays the slightest attention to what I say. You go ahead arguing just the same, each of you, and I suppose the sensible thing for me to do is not to make a rumpus about it but to simply again tell you that it is my desire that there be no argument on objections to evidence unless I seek some enlightenment which I will do when I think it necessary.

. . . . . .

—Tr. Tr. 3030—

New York, April 11, 1949

Mr. Crockett: Again I offer Defendants' Exhibit GG, in evidence.

I believe you have a copy of this, have you not, Mr. Gordon?

Mr. Gordon: Yes, I have the copy that Mr. Philbrick turned in to the FBI.

Mr. Crockett: Does your Honor care to look at it again?

The Court: No. I have a very distinct recollection of it.

Do you object?

Mr. Gordon: I would like to change the ground of the objection.

The Court: Well, I don't remember your stating any ground before, Mr. Gordon; I hadn't asked for a statement of grounds, as I remember it, but perhaps

I did; but if you desire to say something now about it I will hear you.

Mr. Gordon: I thought I had objected on the ground that no foundation for it had been laid, and therefore to its competency, and I object to its relevancy at this time.

The Court: Well, I may say that the chief reason that I have been excluding it, and the reason I am going to exclude it again, is, it seems to me, one of those multitude of collateral issues which may have some place in the case but which I am going to try

—Tr. Tr. 3031—

my best not to have them exaggerated or blown up into undue importance. This seems to me to have only a remote bearing upon the testimony given by the witness. It is quite consistent with what he says that there might have been a number of things; there might have been a lot of talk about various policies of the Communist Party as to youth and women and anti-Semitism and working for the Negroes, working for the unions, and working for laboring people generally, and I feel that those issues should not be placed into a matter where they are given undue importance.

Mr. Crockett: May I be heard before your Honor makes his ruling?

The Court: Yes, I will hear you.

Mr. Crockett: The bulk of the testimony given by this witness has had to do with what was taught at these various membership meetings and training classes which he says were carried on by the Com-

munist Party of Massachusetts. Now he has also testified—I just brought it out from him—

The Court: Just a second.

(To Witness) Did any of those come in with these pro 4 meetings? This pamphlet, GG—

The Witness: No, sir. We have not used that in any of the pro meetings.

The Court: That is what I thought.

—Tr. Tr. 3032—

Mr. Crockett: But he did testify that they were used at meetings which he attended subsequent to the dates set forth in the indictment, and that they were part of the course of study that was offered during the educational portion of these meetings. Now if the witness has made a report, the substance of which he has testified here, and which deals exclusively with what was said at these meetings with reference to Marxist-Leninist literature, I submit that the jury is entitled to know the entire story of what was taught or what was discussed at these meetings, and in order to get that entire story we need this document in evidence to supplement the testimony of the witness. It is not contended primarily here that this document is offered to contradict his testimony; it is offered to supplement his testimony.

The Court: You see, it is always that way when a person is charged with a specific crime. It often comes up that they would like to go into other matters, to get the full picture, and the first thing you know there is so much to the picture that you get your mind off of what is the central feature of the

case. Now I don't think this case has to do with whether the Communist Party or these defendants, or any of these individuals, were in favor of these various things that they said they were in favor of. That comes into the picture to some extent, but I

—Tr. Tr. 3033—

felt that it was my duty here to see that it didn't suddenly expand the case to the point where we would never be through.

You see, if you get this pamphlet in, then there will be another one and another one and another one, and they will all get into these other matters which doubtless were part of the program, as the witness has testified.

Mr. Crockett: But the witness has testified, your Honor, that he was taught something about revolution—

The Court: Yes, he has.

Mr. Crockett: —and that there was supposed to be—the ideal time for revolution was if there was a depression. Now this pamphlet has to do with the position of the Massachusetts Communist Party on the question of depression, and I think that becomes very relevant as a supplement to the testimony which the witness has given.

The Court: Well, I am sorry that I can't agree with you.

Mr. Isserman: If the Court please, I would like to object to your Honor's characterization about "the bulk of the witness's testimony," and of the exhibit, and I would like to be heard—

The Court: Did I characterize the testimony?

—Tr. Tr. 3034—

Mr. Isserman: I believe your Honor did, and I would like to be heard on the question of relevancy of the document which—

The Court: No, I do not desire to hear you, Mr. Isserman.

Mr. Sacher: I should like an opportunity to call your Honor's attention to specific testimony and to a specific portion of this exhibit that I think will have a bearing on it. I would like to invite—

The Court: Would you like to have the jury excused so that we can take an hour or so with this?

Mr. Sacher: No, I think it will take a moment. I don't even have to mention it; I will hand the page—

The Court: If it will take a moment, you can go ahead.

Mr. Isserman: Before Mr. Sacher does I make objection to the character of your Honor's comment.

The Court: Then I will change my mind and I will not hear him. We will just get into another wrangle and I want to avoid it.

Mr. Gladstein: May I call your Honor's attention to the fact that because you just took umbrage at an objection which Mr. Isserman made as a lawyer—

The Court: I took no umbrage.

Mr. Gladstein: —you then reacted—

—Tr. Tr. 3035—

The Court: I suppose you begin—

Mr. Gladstein: May I finish, your Honor?

The Court: —to talk about my inflection of voice—

Mr. Gladstein: No, I am not talking about your inflection.

The Court: But I am not taking any umbrage at all.

Mr. Gladstein: But, your Honor—

The Court: But I am not going to have a long-drawn-out discussion of something that is perfectly clear to me.

Mr. Gladstein: No, but—

The Court: Now I don't desire to hear you on it, Mr. Gladstein.

Mr. Gladstein: I am not arguing the point because your Honor hasn't said you would hear me but I am pointing out that apparently your reaction to Mr. Isserman's objection was very manifest, was that you immediately reversed the ruling that you had previously announced concerning the right of Mr. Sacher to make an argument concerning a document.

The Court: I saw a very definite possibility of prolonged discussion which I desired to avoid.

—Tr. Tr. 3036—

Mr. Gladstein: Well, I submit that you were visiting a reprisal upon one lawyer and the men he represents because your Honor reacted unfavorably to the fact that another lawyer made a legal objection.

The Court: I suppose that I have been doing some very bad things and I am accustomed to your telling me so, and I take no umbrage at it at all but I must say that I can't agree with your characterizations.

Mr. Gladstein: Well, I hadn't attempted to make any characterization.

The Court: Well, you said two or three things about me that seemed as though you were characterizing what I did but I bear them patiently and I shall continue to do so.

Mr. Gladstein: May I say something in connection with the exhibit that has been offered?

The Court: No; I don't want to hear any argument about it.

Mr. Gladstein: Very well.

By Mr. Crockett:

Q. You were—

Mr. Isserman: Just a minute. I would like to make it clear, your Honor, that I did not intend to argue but I did want an opportunity to state grounds for sustaining the offer of this exhibit.

—Tr. Tr. 3037—

The Court: Very well, we will let the matter drop.

* * * * *

—Tr. Tr. 3129—

New York, April 12, 1949

Q. To your knowledge did any branch of the Communist Party in Massachusetts ever put out any literature referring specifically to your employer during the period of your employment?

Mr. Gordon: Objection.

The Court: Sustained.

Q. Were you working for Samuel Pinanski—

Mr. Crockett: Strike that.

Q. Samuel Pinanski was one of the partners in the M. & P. Theatre Chain where you were employed, is that right?
A. That is right, sir.
Q. That is located at 60 Scolley Square, Boston, Massachusetts?

Mr. Gordon: Your Honor, this is cross on cross. I object to it.

The Court: Yes.

Mr. Crockett: I am not cross-examining. I am just calling his attention to something that I am

—Tr. Tr. 3130—

leading up to, your Honor.

The Court: It seemed to me you have led up to that same thing four or five times, you and Mr. McCabe. If you intend to inquire into the private affairs of that corporation, I shall not allow it.

Mr. Crockett: I object to the Court anticipating my line of cross-examination.

The Court: Well—

Mr. Crockett: I would like to point out that this is not the first time that the Court has done that. I think I have a right to refresh the witness's memory by calling his attention to what he has been asked about before.

The Court: I was ruling and indicating to you what I had ruled before. Now, I wish you would try to avoid making comments that are not proper. When you speak of me as though I were some colleague, perhaps, or some member of the bar, I don't think it is quite the proper way to speak.

Philbrick—Cross
Colloquy

Mr. Crockett: I was stating an objection, your Honor, and I think I used proper language in doing so.

The Court: It may seem so, and I shan't be drawn into any personal controversy over it. So you may go ahead.

Q: During the period of your employment with M. & P.;
—Tr. Tr. 3131—
Theatres, Mr. Philbrick, did they circulate a film called "Song of the South"?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Was the Communist Party in Massachusetts opposed to the film "Song of the South"?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Do you recall the period of time when the film "Song of the South" was being shown in theatres in Boston?

Mr. Gordon: Perhaps I should not object, your Honor.

The Court: No. I think, Mr. Crockett, if you continue to repeat the thing in these questions you will have perhaps circumvented my ruling, and I hope you won't do that. I cannot see that this has any bearing on the case at all. What that concern did, what pictures it published, what opposition there might have been one way or another I consider not

relevant here and having no bearing upon the case or upon the testimony of this witness. I indicated a few moments ago, when you challenged me with anticipating, as though there was something wrong in my doing that, that you and your colleague Mr. McCabe have come up to the question of the private affairs of this corporation a number of times, and

—Tr. Tr. 3132—

each occasion I have sustained objections to it. A moment ago I told you that I did not desire you to pursue that subject, despite which you have asked a series of questions which carry certain implications. I wish you would not do that again.

Mr. Crockett: I wish to object to the Court's use of the term "challenge" in characterizing the objection previously made.

The Court: You said, "it is not the first time your Honor has done this or that." I think I understand the dignity of my office, and that sort of talk does not impress me favorably. Perhaps you think that you may provoke me into saying something that will, perhaps, have some effect on the case, but I can assure you that that will not take place.

Mr. Crockett: I should like to assure the Court that I have no desire to provoke the Court. I desire to do nothing other than to perform my duty, to represent the interests of my clients.

The Court: Yes.

Mr. Crockett: And if, in doing so, it meets with the Court's displeasure, I shall desist.

The Court: No, your duty to your client does not

meet with any displeasure on my part at all, but I

—Tr. Tr. 3133—

will ask counsel to be respectful.

Mr. Crockett: May I proceed?

The Court: Yes, you may, but not with the repetition of the questions that you just put.

* * * * * *

—Tr. Tr. 3158—

Q. Now in connection with the subject of mobilization and the mobilization which took place in July of 1948, did any member of the Communist Party tell you what the purpose of that mobilization was? A. Yes, sir.

Q. And who was it that told you? A. Martha who is—

Mr. McCabe: Objected to, your Honor.

The Court: Overruled.

Q. Martha? A. The comrade named Martha who was chairman of that particular group at that time.

Q. And what did she tell you the purpose of that July 1948 mobilization was?

* * * * *

Mr. Gladstein: I object to that as hearsay, not binding on the defendants. Moreover, in the absence of the fixing of time, July '48 may very well be a time after the return of the indictments in this case.

The Court: Do you recall, Mr. Gladstein, my direction as to the stating of objections and argument?

Mr. Gladstein: Well, your Honor, I thought I

—Tr. Tr. 3159—

would be helpful to the Court by pointing out that it had not—

The Court: I say, do you remember?

Mr. Gladstein: I do remember, yes.

The Court: Don't you think it would have been a little better if you had said that you desired to be heard?

Mr. Gladstein: I am sorry. I thought—

The Court: You thought if you made the argument and asked me afterwards that would be better.

Mr. Gladstein: No, your Honor; it is simply that after you have practiced in courts for many years and you find that Judges all over the country permit you to state the reasons for your objections it becomes difficult for a man to find that all he can say is "Objection." Period. The Court—

The Court: Then lawyers had better avoid doing the things that made it necessary for me so to rule. You will kindly desist from argument now.

Mr. Isserman: I would like to object to your Honor's last remark.

The Court: Very well, objection overruled.

* * * * *

—Tr. Tr. 3189—

Mr. Isserman: I move to strike out the testimony of the witness—

Mr. Gordon: Excuse me a moment. Perhaps the jury shouldn't be here.

The Court: Well—

Mr. Gordon: Even just as a matter of convenience

to them. The last time we took a long time.

The Court: Perhaps they may remain. Do you desire the jury to retire?

Mr. Isserman: No, your Honor.

The Court: You don't expect to take very long?

Mr. Isserman: No, I do not.

The Court: Very well.

Mr. Isserman: I move to strike out the testimony of the witness and all the exhibits introduced by the Government through the witness Herbert A. Phil-

—Tr. Tr. 3190—

brick, on the following grounds: That the information that forms the basis of the testimony and all the exhibits introduced by the Government were fraudulently obtained by the witness as a spy at the behest and in cooperation with the FBI, an agency of the United States Government, which agency financed his said activities. He obtained this information and the exhibits through attendance at meetings in the homes of members of the Communist Party and meetings elsewhere to which he obtained admission solely upon his fraudulent and false representation that he had become and remained at all times a bona fide member of the Communist Party and as such bound by the Constitution and by-laws to advance the objectives of that Party, and as such member at these meetings he participated and influenced decisions on various matters including matters of petition, assembly, matters of supporting or opposing legislative policies and candidates for municipal, state and federal offices. Such activity by this witness was unconstitutional, undemocratic, and inci-

dent to a police state which seeks to exercise control over ideas, thoughts and political activities. It curtailed and abridged as to the defendants and all those associated with them in the Communist Party in Massachusetts the rights of speech, press and peti-

—Tr. Tr. 3191—

tion, assembly and political activity, and also invaded the security of their homes, persons, papers, and effects, which security is guaranteed and which rights are guaranteed by the First and Fifth Amendments to the United States Constitution. Therefore, to allow this testimony into evidence and these exhibits introduced by the Government to remain in evidence, destroys the defendants' right to a fair trial and denies them due process of law under the Fifth and Sixth Amendments of the Constitution.

The Court: Motion denied.

Mr. Sacher: I have something that I would like to call your Honor's attention to in support of this motion if I may.

The Court: Very well. Is it of the same general tenor as Mr. Isserman's motion?

Mr. Sacher: Yes. I do not intend to repeat what he said but I should like to call your Honor's attention—

The Court: As I understand it, you and your colleagues take the view that if someone with knowledge of the FBI or the police is in places where they observe persons who are later charged with crime, that what they see and hear is protected by the Constitutional provisions and may not be proven?

Colloquy

—Tr. Tr. 3192—

Mr. Sacher: Your Honor, if I may say so, with all due respect, there is no resemblance between what your Honor says and the position of the defendants as expressed by Mr. Isserman.

Mr. Isserman: If the Court please, I merely stated my grounds. I didn't argue.

The Court: You see, when you state grounds you have a very curious way of making it sound like argument.

Mr. Isserman: Well, grounds are a part of argument. They indicate the argument but they are not the argument.

The Court: Well, you might put them in a different form than argument, but now let's hear the ground by Mr. Sacher.

Mr. Sacher: I just wanted to call your Honor' attention to the observations of Federal District Judge Anderson in the case of Collier vs. Skeffington.

The Court: I thought you wanted to state grounds?

Mr. Sacher: I said I wanted to read something in support of Mr. Isserman's motion. This appears in 265 Fed. 17.

The Court: Just a second.

Mr. Gordon: I was going to suggest that since it is a matter of law from a law book that counsel could

—Tr. Tr. 3193—

hand it to your Honor.

The Court: Well, I think I will listen to it, but I suppose, of course, if I say anything after you read it, some objection will be made.

Colloquy

Mr. Sacher: I don't think your Honor ought to be inhibited by anything but the proprieties.

The Court: Well, I try not to be.

Mr. Sacher: Shall I proceed?

The Court: Yes.

Mr. Sacher: Here is what Judge Anderson said in the case of Collier vs. Skeffington:

"I cannot adopt the contention that Government spies are any more trustworthy or less disposed to make trouble in order to profit thereby than are spies in private industry, except in time of war when a Nathan Hale may be a spy. Spies are almost necessarily drawn from the unwholesome and untrustworthy classes. A right-minded man refuses such a job. The evil wrought by the spy system in industry has for decades been incalculable. Until it is eliminated decent human relations cannot exist between employers and employees or even among employees. It destroys"—

The Court: I think the jury will have to pass on the question of Mr. Philbrick's credibility, and I can see no useful purpose in your reading something like

—Tr. Tr. 3194—

that unless it be to just argue the matter of spies. We have heard so much about it I suppose we might as well get used to it. I see nothing about calling a person like Mr. Philbrick as a witness which presents anything more than the usual question of credibility.

Mr. Sacher: I just read this because it was part of a determination by a Judge in which he said that he would not believe these spies under oath who had done precisely what Philbrick did—in other words,

under the guise of being members or adherents of a political party had wormed their way into the confidence of their colleagues under false pretenses and then proceeded to testify against them.

The Court: I was afraid that you would get into a summation which seemingly you have done. Now the question of Mr. Philbrick's credibility is one which doubtless will be handled by counsel in their summation to the jury at the conclusion of the case if I find that the case is one to be submitted to the jury. I don't think it is proper under the guise of objecting to his testimony to launch into an argument about spies and whether they are to be believed and so on. That is something for the jury to say.

Mr. Sacher: All I am suggesting is that Judge Anderson sitting as a Judge—

—Tr. Tr. 3195—

The Court: You see, you repeat, as you always do. If I intimate that it is better not to do it, you repeat it. If I tell you not to do it you still repeat it, and I am utterly at a loss what to do. You seem to pay no attention to my directions. Now please, just thoughtfully consider the matter for a moment and then, if you insist on proceeding I will do as I have before, merely remain here quietly and endure it.

Mr. Sacher: I shall not require that.

The Court: Very well.

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—Tr. Tr. 3245—

New York, April 13, 1949

Q. I asked you, what was done in the school, Chicago Workers School, in connection with this book? A. It was, so far as the school was concerned, made the central textbook for, particularly, the courses that went at that time under the name of Marxism-Leninism 1, 2 and 3—later were changed; I believe, to the name of Scientific Socialism 1, 2, 3—and what was done was to take the central theoretical sections which existed in each of the chapters, or each of the more important chapters, and use them as the center around which the principles taken up there were discussed. For example, in the, I think it is, the second chapter, it is one of the earlier chapters, there is a discussion of the role of the Communist Party. When the problem of the role of the Party was to be discussed, that was used as the basic material, with side reading from the older classic. When the question of tactics of the Communist movement in situations previous to a proletarian revolution, that is to say, in a democratic transformation from an older and more feudal situation, was discussed, the

—Tr. Tr. 3246—

fourth—the third chapter, one of the earlier chapters, I am not sure of the exact number, was used. So that what was done was, we said, "This was the experience of a Communist Party in a given situation. In the course of meeting these problems, the Russian Communists, Lenin and so forth, solved them in this and this manner; what sort of general conclusions for the working class movement in general can be drawn from these conclusions."

And since these chapters themselves were based on decisive and important material, drawn out of other and earlier writings of Lenin, Stalin, and so forth, it became a kind of compendium in one volume of what otherwise existed only in a whole series of scattered books here and there. Hence, it was stated at that time, in general, in the Communist Movement, in articles of all kinds and in conferences, in all the educational work, that this book—

Mr. Crockett: I object to this.

The Court: Yes, I will sustain the objection. Strike out the last part.

Mr. Isserman: I move that the entire answer be stricken on the ground that the witness is allowed to testify to the contents of a book, chapter by chapter, on what was done with specific chapters, and the book itself is not in evidence.

—Tr. Tr. 3247—

The Court: Well, he says what his recollection is of what he observed there. What I struck out was the part about all the books everywhere said this and that. I struck that out, but I will leave in what he said about the teaching in the school.

Mr. Isserman: But he is referring to the various chapters of the book and describing their contents and the book is not in evidence, and that is the best evidence of the contents.

Mr. McGohey: If the Court please, this book was marked Government's Exhibit 30 for identification and offered as a book. Thereafter certain passages of it, which were read, were offered.

Meyer—Direct
Colloquy

Mr. Isserman: It was not, if the Court please; my recollection is it was offered as a book. It was allowed. At the Court's suggestion the offer was withdrawn. And at this point the book is merely marked for identification and certain pages were marked in evidence.

The Court: That is just what Mr. McGohey said.

Mr. Isserman: He said it was offered as a book. It was not offered as a book.

The Court: It was offered—

Mr. McGohey: It was offered as a book and the Court declined to allow it.

—Tr. Tr. 3248—

The Court: —as an object. We mustn't use the word "book,"—as an object, and I was the one who suggested that if the whole book was put in evidence we might be trying all kinds of things until kingdom come.

Mr. Isserman: That is precisely—

The Court: And I didn't want to have that done, and the result was, just as Mr. McGohey has said, that certain pages were received in evidence. I am going to permit to stand what this witness has testified about what he observed in that school, and the objection is overruled.

Mr. Sacher: May I respectfully call your Honor's attention to the fact that the only pages in this volume in evidence are pages 130 to 172? And the witness has described the contents of Chapter 2 of Exhibit 30 for identification, which consists of, I think, about a hundred pages.

The Court: Mr. Sacher, I don't know how I am to stop you from arguing.

Mr. Sacher: I am not arguing. I thought I was of help to the Court.

The Court: I try every way I can to be pleasant about it, but firm, but you get up and you say over again the very same thing Mr. Isserman has just said, and you go right on about it. Now, I understand the situation here, and I will allow the answer to stand.

* * * * *

—Tr. Tr. 3255—

Mr. McGohey: If the Court please, I wonder if it might conserve some time if, while counsel are looking at Exhibit 48-A, that I have offered, I might read from 47-A?

The Court: It is an excellent idea unless objection is raised.

Mr. McCabe: I don't think it is an excellent idea to have evidence going into this jury while we are examining other evidence which is about to be—

Mr. McGohey: The point is—

The Court: I notice—

Mr. McGohey: —this is in evidence. The whole thing is in evidence.

The Court: And I have noticed that the examination of these last two exhibits has been very deliberate, and I think, perhaps, it might not be a bad idea, as I have observed that six of you have already read it through and it remains only for the

seventh to do so, that, perhaps, while Mr. McGohey reads from Exhibit 47, the other counsel could be alert to see if he read correctly—while you read Exhibit 48 for identification, Mr. McCabe. Don't you think that is sensible?

Mr. McCabe: Is your Honor speaking advisedly when your Honor says that six of the counsel have read the article through?

—Tr. Tr. 3256—

The Court: I should have said five.

Mr. McCabe: That anyone has read it through, your Honor?

Mr. Isserman: I wish to state that I did not have—

The Court: I cannot seem to make even the simplest comment without arousing a storm of objections. I see Mr. Isserman again on his feet.

Mr. Isserman: Yes, but there is no storm. I am merely rising to state that I haven't read the article through and could not have done so in the short time in which I had to look at it.

The Court: Perhaps you were just fingering it.

Mr. Isserman: I was looking at it and skimming over it but I did not read it, and I object to your Honor's remark.

The Court: I cannot say you read it through—one never knows—but I can testify to the length of time it took.

Don't you think it is a good idea to let Mr. McGohey go ahead and read from Exhibit 47 while Mr. McCabe examines, to the extent that he finds it necessary to examine Exhibit 48 for identification?

What do you think about that, Mr. McCabe?

—Tr. Tr. 3257—

Mr. McCabe: Well, if your Honor is—you are restricting my opinion on the conduct of the case to this one element, I take it?

The Court: It doesn't seem to be a vital point but perhaps we have used as much time talking about it as we would have used if you had gone ahead.

So, Mr. McGohey, you will please refrain from reading that exhibit until all of counsel for the defense have concluded their examination of the one now under consideration.

Mr. McGohey: Of course, I think the record—pardon me, Mr. Crockett—I think the record should show that what I have asked the Court to read from is a document which, at the time it was offered, was passed to counsel for the defendants, that they had read it and that it is admitted in evidence.

The Court: I understand their point, it is that they cannot tell whether you are reading it accurately while their mind is on another exhibit. So, for the time being, and without intending to make it a ruling for the balance of the trial, I shall sustain their objection.

Mr. McCabe: Of course, your Honor—

The Court: And I ask you not to read until they have finished glancing at what they are looking at.

Mr. McCabe: I object to your Honor's character-

—Tr. Tr. 3258—

ization of the reasons for my objection. It had nothing to do with accuracy—

The Court: What were your reasons?

Mr. McCabe: —with the accuracy of any reading. When evidence is being presented to a jury, your Honor, material is being read to a jury, counsel representing a defendant has not only the right but the duty to pay strict attention to the reading of it for the purpose, among other things, of determining whether other portions of the evidence should be read for the purpose of trying to determine whether the material read, excerpts from the article, properly represents the contents of the article, or whether it is torn from context. Sometimes an expression from the jury, an expression of particular interest from the jury, may indicate that they are getting a wrong impression of the article. So that I think—

The Court: Maybe scratching their heads or something like that?

Mr. McCabe: Well, I haven't noticed any of the jury doing that, your Honor, not that there is any harm in that.

The Court: You have commented on all sorts of trivial things. I don't think you are apt to find, by looking at the jury, as Mr. McGohey reads to them, anything which would indicate to you whether you

—Tr. Tr. 3259—

ought to do something or another, but I have sustained your objection. Mr. McGohey will not read until you and your colleagues have entirely concluded your perusal of Exhibit 48 for identification.

Mr. Crockett: Now, if the Court please, I wish at this time to interpose an objection to the Court's initial comment concerning the amount of time used

in examining Government's Exhibit No. 48 for identification, and I should like to state that, on behalf of myself, there has been no undue delay in examining that exhibit, and neither have I noticed any undue delay on behalf of any of the other attorneys who represent the defendants here.

—Tr. Tr. 3260—

The Court: Well, you see, Mr. Crockett, you and your colleagues have a way of thinking that when you say something that makes it so, and I think we will have to leave it perhaps to someone else to draw conclusions. Now what you have been doing you have been doing in the full and open view of every one here, and I think perhaps we can let it go until Mr. Gladstein, who is now taking another look at that 48 for identification, can consider it together with Mr. McCabe sufficiently to conclude the perusal.

Mr. Gladstein: Let the record show that I had not a chance to really look at it, and I tried to listen to what your Honor was saying as a matter of fact, which gave me no opportunity to study the document.

The Court: Well, you didn't miss much, as a matter of fact.

Mr. Isserman: I would like to object to your Honor's remark as the document had nine pages in it, I believe, and it took time to study, and whether Mr. Gladstein missed much by reading it or not, is certainly not a comment for the Court to make.

The Court: These objections are reaching a new low.

Mr. McGohey: If the Court please, this has been offered in evidence.

—Tr. Tr. 3261—

Mr. Crockett: And I wish to object to the receipt in evidence of Government's Exhibit No. 48, and to interpose a special objection in so far as the defendants whom I represent are concerned.

The Court: Let me look at it, Mr. Borman, please.

(Clerk hands to Court.)

The Court: Is it this article by Williamson, is it, that is offered, Mr. McGohey?

Mr. McGohey: Yes, your Honor.

The Court: (After examining) I will allow it.

* * * * * *

—Tr. Tr. 3304—

Q. Will you give us your best recollection of the substance of what Mr. Winter said at that Lenin Memorial meeting? A. Well, the opening remarks were in the nature of a tribute to Lenin and I specifically Mr. Winter stating that the time was soon to come when Lenin's teachings would be put into action.

Q. Do you remember what else he said? A. Yes. He continued during the course of the talk which lasted about 30 to 40 minutes dealing with a strike situation which was then in progress in Detroit. The General Motors Corporation was out on strike and Mr. Winter was very critical of the strategy that was employed by the union and he specifically mentioned Walter Reuther in that connection and—

Mr. Sacher: I object to this and ask that the witness be required to state what was said.

The Court: That is what he is doing.

Mr. Sacher: No; he said Mr. Winter was critical and that is stating his conclusion I submit.

The Court: Well, if you can be more specific, do so, as far as you can recall.

—Tr. Tr. 3305—

Mr. Gladstein: I have another objection. I move to strike the answer—

The Court: Try to keep your mind on what you were about to say.

(To Mr. Gladstein) Yes?

Mr. Gladstein: —strike out the answer so far as it has gone dealing with the strike of General Motors and remind your Honor of the fact that I was not permitted in cross-examination to go into any of the facts concerning the Allis Chalmers strike some years before although the Government went into it on direct examination, and I wish to point out to your Honor that the reason your Honor wouldn't permit me to examine on that subject was, as I recall it, that you felt it was remote from the issues in this case; and I therefore suggest that such portion of what is claimed to have been said there concerning such strike or any such matter concerning issues not in the indictment has no place in the case.

The Court: You see, Mr. Gladstein, you illustrate so well the wisdom of my ruling that there should be no argument on objections. I don't know how I

am going to enforce these rulings without being disagreeable. I will just let it go and at the present time I will just overrule the objection.

* * * * * *

—Tr. Tr. 3308—

Q. Now I think you said that the defendant Winter was there while Buck addressed the audience? A. He was. was.

Q. Did the defendant Winter interrupt Mr. Buck? A. No, he did not.

Q. Did he at the conclusion of Mr. Buck's speech get up and criticize it or say that it was wrong? A. He did

—Tr. Tr. 3308a—

not.

Q. Now will you give us your best recollection of—well, perhaps before we get what Mr. Buck said—how did Mr. Buck address the group who were assembled there? A. Well, during the course of his speech he addressed the gathering by using the term "We Communists."

Q. "We Communists"? A. (Nodding.)

Q. Is your answer yes? A. That is right.

—Tr. Tr. 3309—

Q. Will you give us your best recollection of the substance of what Mr. Buck said to the meeting?

Mr. Gladstein: I object to giving what Mr. Buck said to a meeting. I object that it is immaterial. I call your Honor's attention to the fact that the sole basis on which this is now offered is that somebody sat there, present, and did not get up to criticize.

The Court: Are you making these arguments just to force me to use some measures to stop you?

Mr. Gladstein: No, but, your Honor, Mr. Gordon—

The Court: You see, so often I mention the circumstances to you that lawyers here, both for the Government and for the defense, on matters of evidence will merely say they object, and you always look at me pleasantly and then you proceed to disregard my instructions.

Mr. Gladstein: May I have permission to say something on this?

The Court: No, you may not.

Mr. Crockett: I object, your Honor. I should like to state the reasons for my objection.

The Court: I will hear you, Mr. Crockett. I hope they are good.

Mr. Crockett: I object to this testimony as being

—Tr. Tr. 3310—

irrelevant and incompetent. I think it has no more connection with this case than the assumption that President Truman, for example, was responsible for being present when Prime Minister Chamberlain spoke out in Fulton, Missouri.

Voices: Churchill.

Mr. Crockett: Churchill,—I beg your pardon.

The Court: Overruled.

* * * * *

—Tr. Tr. 3320—

* * * * *

Mr. Isserman: I object, your Honor, and move that the answer be stricken.

The Court: Motion granted, the answer is stricken, and I will sustain the objection to the question as leading.

Q. Did Mr. Winter at the conclusion of Mr. Buck's address make any remarks referring to Mr. Buck's address? A. No.

Q. Did anybody else? A. Not that I recall.

The Court: You better speak up so we can hear you.

The Witness: Not that I recall. I am sorry.

Q. Now will you give us your best recollection of the substance of what Mr. Buck said at the meeting?

Mr. Isserman: I object to it and plead surprise.

The Court: Overruled.

A. Mr. Buck likewise—

Mr. Gladstein: Your Honor, may I state the grounds of objection?

The Court: I rather suspect it is what I have already heard but you may do so.

Mr. Gladstein: Your Honor, I object because this calls for statements not made by any defendant but statements supposed to have been made by some other person, the theory of its being offered against the defendants being that the defendant happened

—Tr. Tr. 3321—

to be in the same room—same room in a public meeting.

Colloquy

The Court: At a Communist meeting.

Mr. Gladstein: Any meeting, and didn't get up afterwards—open public meeting, and because he didn't get up afterwards and say anything by way of disagreement or otherwise, the theory is it is admissible against the defendant.

The Court: That is what you say the theory is.

Mr. Gladstein: May I know then the theory upon which it is received?

The Court: You see, it is the same old story. You get up to state grounds of an objection and argue, argue, argue. You ask me questions and then you begin to ask Mr. Gordon, and then we forget all about what we are doing and we have to start all over again.

Mr. Gladstein: No, my point is it converts the charge from one of supposed advocacy by a defendant into something that somebody else said.

The Court: It is the old story. You want to get up and argue to the jury, and perhaps others, when all you do is object and you continually insist that you are stating grounds of an objection when all you are doing is just making a little speech which you should reserve for your summation. The witness may answer the question.

—Tr. Tr. 3322—

Mr. Crockett: I object to the tone of voice of your Honor and to the Court's statement—

The Court: You object to my tone of voice, Mr Crockett?

Mr. Crockett: I certainly do.

The Court: I am very sorry, there was nothing about my tone that should give rise to any criticism whatever.

Mr. Crockett: I further object to the Court's statement with reference to Mr. Gladstein's statement in which your Honor said it was a Communist meeting, as being contrary to the testimony that has been given in this case.

The Court: And what do you say it was?

Mr. Crockett: It was a public meeting.

The Court: But it was a Communist meeting, was it not?

Mr. Crockett: It was a public meeting, according to the record in this case.

The Court: I recall no statement by me that there was anything secret about it. It is bandying words over nothing. It seems to me the witness has said it was a Communist meeting.

(To Mr. Gordon) Let me see that leaflet.

Mr. Gordon: The leaflet says—

—Tr. Tr. 3322a—

The Court: Doesn't the leaflet say it was a Communist meeting?

Mr. Gordon: Yes, your Honor.

The Court: Show that to Mr. Crockett. I don't understand your point.

—Tr. Tr. 3323—

Mr. Gordon: This is offered not against the defendant Winter but against all the defendants as being in 1946.

The Court: I know, but there is some criticism by Mr. Crockett of my using the words that it was "a Communist meeting."

Colloquy

Mr. Crockett: I submit—

The Court: What do you say it was?

Mr. Crockett: I submit, your Honor, that the testimony in this case has been to the effect that this was a public meeting, open to the public.

The Court: Who said it was not?

Mr. Crockett: Your Honor said "a Communist meeting," with special emphasis on the word "Communist."

The Court: Well, that is the most ridiculous thing I ever heard, Mr. Crockett. I wish you wouldn't do that. There is just no sense in that at all.

Mr. Crockett: There has been some testimony in this case, your Honor, about meetings held by Communist clubs—

The Court: There sure has.

Mr. Crockett: —and persons who were not members were not supposed to be present—

The Court: That is right.

Mr. Crockett: —similar in all respects to Young

—Tr. Tr. 3324—

Democratic Club meetings which I attended.

The Court: Did not sound similar to any meetings I have had anything to do with, as long as we are talking personalities.

Mr. Gordon: I must take exception to Mr. Crockett's statement that Young Democratic Clubs are attended by Communists and only Communists.

The Court: It is the old story—

Mr. Crockett: I don't recall making any such statement, your Honor,

Colloquy

The Court: —you were telling us about the meetings you have attended—.

Mr. Crockett: Yes.

The Court: —and you said these meetings which are described here were similar to the ones you attended. I say I never went to any meetings, like that, as long as we are talking personalities about it. What difference does it make what meetings you went to or what meetings I went to?

Mr. Crockett: I am concerned with Mr. Gordon's last remark in the record, and I submit that he misquoted me, and that is what I got up to object to.

The Court: Then, let us have it all out. Let us have the quotation from Mr. Gordon and we will see whether he misquoted you. We may find a comma

—Tr. Tr. 3325—

missing or something.

It is a further demonstration that cutting off these arguments has been, at least, effective.

Mr. Crockett: I object to that observation on the part of the Court.

Mr. Gordon: Your Honor, maybe we had better get on with the questioning of the witness.

The Court: No, we will see, now that Mr. Crockett has raised the question, whether you misquoted him or not. Let's not leave everything up in the air so we jump from perch to perch and never alight anywhere. This time we will stop and see what it is. Find the place where Mr. Crockett made a statement and where Mr. Gordon made a statement.

(Mr. Gordon's statement read by the reporter.)

Colloquy

Mr. Crockett: I submit that I made no such statement.

Mr. Gordon: Now let's see what Mr. Crockett said, Mr. Reporter.

(Mr. Crockett's statement read by the reporter.)

Mr. Gordon: Let's get that straight.

(Mr. Crockett's statement re-read by the reporter.)

Mr. Gordon: I must interrupt. That is not what Mr. Crockett said.

The Court: Well, I guess we will—

—Tr. Tr. 3326—

Mr. Gordon: As long as it is the subject of laughter let me finish it, please, your Honor.

The Court: It gets so after a little while I won't remember what this is about. But go ahead and tell me.

Mr. Gordon: As I understand it he said there was some testimony about Communist Club meetings. He didn't say persons were present who were not Communists. He said no one was present who wasn't a Communist.

The Court: Maybe you misunderstood him. That is something we all may do. It looks like this time Mr. Crockett may have been right.

Mr. Gordon: Mr. Sacher says it is possible that is what he said.

Mr. Sacher: Oh no, no.

The Court: It just shows how you can get to waste a lot of time. But everybody is in a good humor now and I have an idea this is a good time to adjourn. We are going to have the Passover holi-

day and Good Friday. I think it is an excellent time for us all to break up with a very pleasant feeling of good will. And so with that we will adjourn until next Monday morning, but before we adjourn let me give you my little admonition.

Ladies and gentlemen of the jury, remember the admonition I have heretofore given you:

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—Tr. Tr. 3366—

New York, April 18, 1949

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The Court: You have asked a long series of questions to which I have sustained objections having to do with this General Motors strike which is not in issue in this case, and you go on asking questions as though you were telling us the facts as if they were so and when I sustain all these objections I would think it would be well to pass on to something else. But in any event when you state something as positive fact there is a question after that and you are merely asking the witness whether these things are so. That is all right.

Mr. Crockett: Well, they happen to be facts but I am merely saying—

The Court: You shouldn't state that, Mr. Crockett. You know you have no right to do that. Now please do not do that again.

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Nowell—Direct
Colloquy

—Tr. Tr. 3387—

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Mr. Gladstein: If your Honor please, I submit that there has been already more than enough of this so-called background and I ask your Honor in the discretion that you possess to require the prosecution to elicit testimony if it has any testimony to elicit from this witness dealing with the period involved

—Tr. Tr. 3388—

in the indictment, April 1945 and thereafter, and not to permit—

The Court: I shall give no such instructions, Mr. Gladstein.

Mr. Gladstein: But, if your Honor please, you have already said you will see if there is any connection.

The Court: He has already made the connection.

Mr. Gladstein: If your Honor please, he has already said the last time he had any connection with the Communist Party was in the year 1936, and I submit that that not only being several years before the Smith Act, under which this indictment is brought, but ten years prior to the period when the conspiracy was supposed to be formed,—

The Court: Mr. Gladstein, do you remember my saying I did not desire to hear argument?

Mr. Gladstein: But, your Honor, this is highly prejudicial.

The Court: If you insist on going ahead you may do so, but if you do so realize it is against my expressed command.

Mr. Gladstein: I assign your Honor's handling of my objection as misconduct.

Nowell—Direct
Colloquy

The Court: I am getting used to these charges of misconduct. I don't think there has ever been a case where so many charges of misconduct have been made with so little foundation.

—Tr. Tr. 3388a—

Mr. Gladstein: I assign the present ruling as misconduct.

The Court: All right.

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—Tr. Tr. 3398—

Mr. Gladstein: No, your Honor; I submit that if the charge here is something that these men are supposed to have conspired to advocate beginning April 1945, that this is most highly prejudicial and has no probative value whatever.

The Court: Mr. Gladstein, I have suspected for some time, and now I am thoroughly convinced, that your insistence upon arguing matters is done to provoke me.

Mr. Gladstein: No, your Honor, that is not true.

The Court: You are just wasting time—

Mr. Gladstein: It is done in an effort to try to persuade you—

The Court: You are simply wasting your time if that is the purpose, and I can conceive of no other because you get up and say substantially the same thing again and again and again, and it has been said before by others. The questions, so far as the record is concerned, are plainly stated there. If it is your point to assign error, the error has been assigned not once, not twice, but many times, and you are just wasting your time if you think you are going to provoke me—

Mr. Gladstein: No.

The Court: Because you won't.

Mr. Gladstein: May I state the purpose of my objection?

—Tr. Tr. 3399—

The Court: No—

Mr. Gladstein: I haven't given up hope and I won't give up hope—

The Court: Well,—

Mr. Gladstein: —either this court or some court will appreciate the validity of my point—

The Court: You see, Mr. Gladstein—

Mr. Gladstein: May I finish, your Honor?

The Court: —Mr. Gladstein, when the Court, who is in charge, tells a lawyer a certain thing, the lawyer ordinarily will respect the Court's direction and follow it, but you seem to have a notion that it is better for you and your clients to do otherwise. Now I am not going to resort to any unseemly means of stopping you but from now on I think it must be very evident if you desire to argue without my leave that you are disobeying my commands.

Mr. Gladstein: Well, may I make a suggestion?

The Court: Well, I think you would do better if you sat down; but if you prefer not to you may go on.

(Mr. Gladstein sits down.)

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—Tr. Tr. 3433—

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Mr. Sacher: Your Honor, Mr. Winter is being tried for something alleged to have happened between 1945 and 1948.

Nowell—Direct
Colloquy

The Court: Didn't the witness testify that Mr. Stachel told him to go over there and see if he couldn't learn something to overcome his error?

Mr. Gladstein: But that isn't what the defendants are being charged with. The defendants are being charged with one thing in the indictment and you are permitting evidence on something else. I submit it is not due process of law to be told in a grand jury indictment that you are charged with teaching and advocating something from and after 1945 and then having evidence given that deals with the year 1931.

The Court: Do you realize, Mr. Gladstein, that the intent of these individual defendants is involved?

Mr. Gladstein: I submit it is not legally involved because there was no statute in 1940.

The Court: Do you remember that that point had been argued a dozen times, and I have decided adversely to your contentions?

Mr. Gladstein: But, your Honor, I still had hoped we may be able to persuade you of the error of your ruling.

The Court: I think you have persuaded me con-

—Tr. Tr: 3434—

tinually that you disobey my instructions.

Mr. Gladstein: Well, I submit it is not a fair trial to be presented with this sort of inquiry in the face of the character of the indictment. I object to this line of examination.

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—Tr. Tr. 3437—

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Colloquy

Mr. Isserman: If the Court please, I would like to adopt the argument of Mr. McCabe as to my defendants, whether they were named by this witness or not, and add to it the fact that the matter is a matter of unfair surprise in that there was no reference to the time or the place—the time covered by this testimony or place at which the events were supposed to have happened—in the indictment, no indication in the indictment as to the time.

The Court: I would suggest, Mr. Isserman, if it is possible to do it, when you desire to argue some matter of evidence you receive my permission to do so.

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—Tr. Tr. 3508—

New York, April 19, 1949

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The Court: Let me ask you this. The witness was asked whether he worked for the service department and he said he didn't. Do you take the position that Mr. Isserman takes that when you get a negative answer on a collateral matter, that you may continue cross-examining? Didn't you ever hear of that rule?

Mr. Gladstein: I don't want to plead ignorance of any of the rules, even though I have not had occasion to think much about those rules in the last couple of weeks.

The Court: If that is one of those mild darts, it failed to meet its mark.

Mr. Gladstein: It is in fond memory and reverence of rules that used to be applicable.

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Colloquy

—Tr. Tr. 3510—

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Mr. Sacher: But I wish to submit that I think there is a misconception on your Honor's part of the significance of the rule in regard to collateral matters. That rule is simply this, as I understand it, that when you interrogate on cross-examination in regard to collateral matters you may not, on the defendants' case or the plaintiff's case, whichever the one may be, introduce evidence to contradict the testimony of the witness in regard to collateral matter.

The Court: No; it further holds that you may not pursue the inquiry. The reason is obvious—.

Mr. Sacher: No, no.

The Court: —because you go on and on and there is never any end. Those are collateral matters we are talking about.

Mr. Sacher: I am talking about precisely collateral matters and I think Mr. Gladstein has stated the

—Tr. Tr. 3511—

rule correctly when he says that the cross-examiner is not bound in the first instance to accept no for an answer. As a matter of fact, in many instances the ultimate question is put to the witness on cross-examination with a view to getting a false answer from him and then, under questioning, that answer, by the details which are then called to his attention—

The Court: If that is what you are up to there is very good reason for me to put a stop to it.

Mr. Sacher: No, your Honor, you are—you are

just stopping—if that be the assignment of the reason on your Honor's part, then I can simply say that the design of the ruling is to simply prevent the eliciting of the facts from this witness, and I wish to submit that—

The Court: You may just as well throw that charge against me in with the others.

Mr. Sacher: But, your Honor—

The Court: I have no intention of excluding the truth here at all.

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—Tr. Tr. 3663—

New York, April 22, 1949

Q. Now give us your best recollection of the substance of what was said, A. Well, after the meeting had gone on for some time and we got into the political aspect of it—

Mr. Gladstein: Just a moment. I want to object to this, if your Honor please.

The Court: You mean you object to his saying that the meeting had gone on for some time?

Mr. Gladstein: No; he is about to give the conversation.

The Court: Oh, I will overrule the objection.

A. (Continuing) Well, after the meeting had gone on for some time we entered into a discussion of politics and the war and Al Lannon reported to the meeting that the war couldn't last much longer, it was about over, but he said that we must put on an extensive recruiting drive there in

Maryland, that they were putting on one all over the

—Tr. Tr. 3664—

country, that we must put one on in Maryland because he said that the American General Staff had already planned a war with Russia and that the only thing that they had to do now was to iron out the details of that war, and, of course, he said in the event of that war with Russia the Party would have to adopt a policy of sabotage. He said —he pointed out that not only this policy must be adopted for war industries but for every other industry, all industries. He said this is to demoralize the population to the extent that they couldn't adequately support a war.

Mr. Gladstein: Now I move that all of this be stricken as wholly outside the issues of the case, indeed falling within a section of the law which, if the grand jury or the United States Attorney had any idea that they could make that kind of a charge against these defendants, they would have charged it under that section of the law that applies.

The Court: Mr. Gladstein, how many times are you going to continue to make arguments without asking my leave to do so in reference to matters of evidence? You do it so persistently and so often—

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—Tr. Tr. 3676—

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Q. Do you remember anything else that was said by Lannon and Schusterman? A. Well, just what it was pointed out, as I said, that a revolution wouldn't be successful in the country without the help of the Red Army and until the Soviet Union had consolidated its position

in Europe that the hope of that couldn't be held very high.

Q. All right, did you say anything? A. Yes, I did. I had a question in my mind and I asked Lannon how the

—Tr. Tr. 3677—

Soviet Union could possibly ever invade the United States without a navy and Lannon pointed out to me as had been pointed out before that the Red Army in Siberia numbered some hundreds of thousands and was a strong force and that the Russians were constantly building it up and they had a good air force, they were building air strips, whenever the time come with air support the Russians could invade Alaska down through Canada and they could even destroy Detroit.

Mr. Gladstein: What was that?

The Court: They could even destroy Detroit, as I understood it. Did you say that?

The Witness: That is what I said.

The Court: Why all of the defendants are smiling broadly.

Defendant Gates: Why certainly we are.

Defendant Potash: Certainly we are.

The Court: We are getting back to that country club atmosphere again. Well, there isn't going to be any country club atmosphere in my court.

Mr. Gladstein: When a man hears something that is ludicrous and absurd to the extreme I suppose he is permitted the human reaction of a smile of contempt.

The Court: That to me is in the same line as some of the comments we have had in the past. It

Nicodemus—Cross
Colloquy

—Tr. Tr. 3678—

may seem very funny to the defendants. They seem to enjoy it, but I don't think it is, and their laughing is not going to have any effect.

Mr. Gladstein: This is the Federal court. I had expected a serious and sober effort on the part of the Government, if it could, to prove the charge that have been made that a political doctrine advocates the overthrow of the United States. But instead of that we are being treated to one after another of these witnesses, persons giving the same type of story we have heard from Congressmen Rankin and J. Parnell Thomas.

The Court: Another little speech.

Mr. Gladstein: That is what we get. Your Honor asked why people are smiling, but there is an irony to it.

The Court: I had occasion to put a stop to some of that before. I am familiar with the practice in criminal cases of trying to laugh something off, and I am not going to have anything but order in my court. When the defendants get hilarious and start laughing and smiling and that sort of thing it is going to be stopped. You can put that in your book.

Mr. Gladstein: I would like the record to show that there was no hilarity on the part of any defendant.

The Court: I saw it and it is noted, and your

—Tr. Tr. 3679—

denial doesn't change it.

Mr. Gordon: Why the defendant John Gates said certainly he was laughing.

Defendant Gates: Do I understand that you are now forbidding me to smile?

The Court: No, I don't think so.

Defendant Gates: It is bad enough we are not allowed to think. Now you want to forbid us to smile as well.

The Court: Well, you are evidently a very bold man and you get up and have your say. That is all right. I am not ordering you not to smile, but I am going to have order in my courtroom, and I am not going to have testimony laughed off by the sort of procedure that we have had in the past. We will just stop there.

Mr. Crockett: I wish to object to the remarks by the Court and assign those remarks as judicial misconduct by the Court in line with various other personal comments he has made concerning the defendants and their counsel.

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—Tr. Tr. 3752—

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Q. Was it from January 8th to January 10th or 11th, 1948? A. I don't just recollect the date of that either.

Q. Did you see that the indictment says that you were there on January 8, 1948? Did you see that before?

Mr. Gordon: I object to any further questions along this line.

The Court: Sustained.

Q. How long after—

Mr. Sacher: I withdraw that.

Q. You were arrested on January 10th, were you, in connection with this offense?

Mr. Gordon: Objection.

The Court: Sustained. You will ask no further questions about that incident. The record shows the man was found not guilty. If you think you are going to retry that case, you are making a mistake.

Mr. Sacher: I am not going to retry it. The record also shows he was sentenced to pay costs after he had already interposed a plea of guilty.

The Court: I will sustain the objection.

Mr. Sacher: All right.

—Tr. Tr. 3753—

Mr. Gladstein: Excuse me. Your Honor, I move that you strike the remark you have just made for the third time about what the record shows.

The Court: I deny the motion.

Mr. Gladstein: And I ask your Honor to instruct the jury to disregard those remarks for this reason—

The Court: I don't want to hear any reason.

Mr. Gladstein: But I want—

The Court: Mr. Gladstein—

Mr. Gladstein: I am trying to assign some remarks—

The Court: —this is one time when you will not give any reasons. So you will—

Mr. Gladstein: May I not assign—

The Court: You will please desist.

Mr. Gladstein: May I not assign remarks as misconduct?

The Court: You may not—you may assign misconduct, you may do that to your heart's content, but you are not going to give any further reasons.

Herron—Cross
Colloquy

Mr. Gladstein: May I assign that which I consider your Honor has done, which I am assigning as misconduct, or am I simply confined to saying misconduct?

The Court: I think that is enough this time.

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—Tr. Tr. 3888—

New York, April 25, 1949

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Mr. Crockett: May I ask the basis for the Court's ruling?

—Tr. Tr. 3889—

The Court: No—you may ask.

Mr. Crockett: But I seem to recall on my cross-examination that a witness was permitted to state the names of the agents.

The Court: This seems a little different to me. You know, I have a certain discretion in these matters.

Mr. Crockett: I just wanted to know if the rules change as we go along.

The Court: I consider that a rather impertinent remark, Mr. Crockett.

Mr. Crockett: I assumed the law of the case had been established in the prior examination.

The Court: Well, you may have your own opinion about my conduct, but I hope you will try to restrain yourself, if you can. I sustain the objection.

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Herron—Cross
Colloquy

—Tr. Tr. 3918—

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Q. Was the club named after a man named Haym Solomon?

Mr. Wallace: Objection.

The Court: Sustained.

Mr. Isserman: If the Court please, I would like to ask the Court to take judicial notice of the fact that the man Haym Solomon is dead some several years. He was a figure in the American Revolution.

The Court: This is the first time I ever have become acquainted with the gentlemen. I don't see what that has got to do with it. You Communists have a way of taking all kinds of names.

Mr. Sacher: I object to that remark and ask your Honor to strike that remark and to direct the jury to disregard it.

The Court: I will deny the motion.

Mr. Gladstein: I wish to say that the remark was

—Tr. Tr. 3919—

intended to be derogatory to the defendants and it couldn't have been intended any other way. I object to it.

The Court: You have done a lot of—

Mr. Gladstein: I would like an objection rather than an invitation to engage in repartee.

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—Tr. Tr. 3935—

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The Court: You have a pamphlet here of a large number of pages. I am trying to tell you that the

portion of that that has the kernel of what you are now saying I will allow to be brought out.

—Tr. Tr. 3936—

Mr. Sacher: But your Honor allowed the Communist Manifesto which was written a hundred years ago. This book was written by the same man who wrote the Communist Manifesto.

Mr. Wallace: There was no objection.

The Court: You see, Mr. Sacher, no matter how you try to go at the matter it is the same old thing. I have told this jury again and again that this is not a trial of books written a hundred years ago or five years ago or any number of years ago, and if you are going to try to persuade them it is you are going to have a hard time with me sitting here because the question is did these individual defendants enter into the conspiracy which is charged in the indictment and if they used those books as paraphernalia and apparatus to serve their purpose as charged—

Mr. Sacher: To call these books paraphernalia or apparatus it seems to me is to reduce writing and books to the level of the tools of thieves, and I tell you that the culture of the world will not long survive with that approach to books.

The Court: You are not going to say any more, Mr. Sacher. You are through with your argument on this. It is the same thing. No matter how I let anybody argue it has got to go on for hours, and now Mr. Dennis is up.

—Tr. Tr. 3937—

And, Mr. Dennis, I don't desire any further argument on this point. It seems to me that the kernel of the question is plain and it has now got down to this same old business of talking, not for the purpose of persuading me on my ruling, but for other purposes. That I do not consider is proper.

Mr. Sacher: I object to that statement, your Honor.

The Court: Well, you may object.

Mr. Sacher: You are impugning the motives of counsel all the time, and I tell you that it is being made impossible—

The Court: I never heard such propaganda in a trial in my life. I am not going to have this trial carried on for the purpose of pushing out propaganda.

Mr. Sacher: I object to that. That is what the prosecution is doing. We are trying to prove the truth here and we are being estopped from proving the truth. That is what is happening.

The Court: I think not.

Mr. Dennis: If the Court please, I would like to make—

The Court: Mr. Dennis—

Defendant Dennis: —a brief observation.

The Court: —I don't desire to hear you now. I

—Tr. Tr. 3938—

really think I have heard all the argument on this that I need.

Defendant Dennis: I would like to call attention to the remarks of the Court, which could not pass unnoticed by myself or anyone. We are 11 defendants—

The Court: Do you realize, Mr. Dennis, that when the Court directs counsel not to argue something that counsel are supposed to acquiesce to the Court's ruling?

Defendant Dennis: But I also understand—

The Court: You see, lawyers very often don't agree with the Court, but they are supposed to be respectful and to follow the Court's directions. Now, that is the way we do here, and I have been trying to give everybody an opportunity, and I shall continue to try to give everybody an opportunity, to bring out what I think is relevant and proper; but where I think a matter is not relevant and proper, then I have to rule accordingly.

It seems silly for a Judge to explain to have to explain this way but I have made up my mind to be just as peaceful about this and as quiet as I can, and just as patient as I can.

And if you don't desire to pay any attention to what I am telling you, why, you go on talking.

Defendant Dennis: I would like to make one

—Tr. Tr. 3939—

brief observation, your Honor, because this is not a small question. I would like to remind the Court that we eleven defendants are not charged—

The Court: You realize I told you not to do this, don't you?

Mr. Dennis: I understood I might make a brief observation.

The Court: But you want to go on just the same. Now I don't think you are helping yourself by doing that, but that is your lookout.

Defendant Dennis: I would, briefly, like to place the following cardinal question. We eleven defendants are not charged, as your Honor intimated, charged with conspiring directly or indirectly with attempting to or take any steps to overthrow our Government by force and violence. We are charged with an alleged conspiracy to organize the Communist Party, which the prosecution claims would advocate and teach the necessity and the duty to overthrow the U. S. Government by force and violence, and that is to say, we are charged with exercising our inalienable rights of free speech, free press and free assemblage, and—

The Court: I suppose you are just daring me to do something to you now but I am not going to do it.

You gentlemen may be just as disorderly, just as

—Tr. Tr. 3940—

disobedient, just as disrespectful as you choose to be, and you will not goad me into doing something which may prove only a source of difficulty in the trial.

Now I tell you again to stop.

Mr. Crockett: I object to your Honor's remarks in so far as they imply that I have been guilty of any disorderly conduct.

The Court: Well, you have been guilty of a good deal.

Mr. Crockett: I object to that remark.

The Court: Well, you may object all you choose.

Defendant Dennis: And the final remark, your Honor, is that we defendants intend, as we are duty-bound to do, to show, really what we have advocated, what—

The Court: I will take an adjournment for five minutes.

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—Tr. Tr. 4036—

New York, April 26, 1949

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The Court: Do you see Gil Green around here anywhere?

The Witness: Yes, the gentleman with the brown suit and the curly black hair.

Mr. Wallace: Will Mr. Green stand up, please.

The Court: I think it is better if the witness goes around—

Mr. Gladstein: I mentioned this the other day. You are not dealing here with people who are ac-

—Tr. Tr. 4037—

cused of robbing a bank; you are dealing with people who are leaders of a political party of national scope whose pictures are known, whose faces are known generally.

The Court: Mr. Gladstein, do you remember my statement about objections?

Mr. Gladstein: I object to this method of identifying these men who are leaders of a political party.

The Court: Are we going to have started what we had yesterday?

Mr. Gladstein: I state my objection.

The Court: I don't see how you lawyers dare do this again when I told you explicitly that if you want to object, object. I understand the point without a lot of argument. I will overrule the objection, deny the motion, and we will proceed as one usually does in criminal cases.

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—Tr. Tr. 4130—

New York, April 27, 1949

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Mr. Crockett: I wonder if your Honor would be good enough to ask the witness to keep her voice up. I am having extreme difficulty hearing her. Would you be good enough to instruct—

The Court: Yes, I will. Have you any suggestion?

Mr. Crockett: I hesitate to give a suggestion for fear I might be accused of running your Honor's court.

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—Tr. Tr. 4146—

Q. What was the subject of his talk? A. He reported to us on the reports made by other members of the National Board, and he told us that—

Mr. Gladstein: Just a moment, please. I want to object to that.

The Court: Well, when you say he reported, that is a conclusion. I will strike it out. What did he say?

Mr. Wallace: Your Honor, I would like to be heard on that. We have heard the word "report" used frequently by the witnesses here and I think that it has an unusual significance in Communist parlance.

The Court: Ask the witness to describe it then.

Mr. Gladstein: Just a moment. I want to move that that be stricken, this word "report" having any

—Tr. Tr. 4147—

unusual significance in Communist parlance, as Mr. Wallace says. The word "report" is a word you can find in the dictionary. It isn't used differently by anybody, whether he is a Communist or not a Communist.

The Court: A lot of other words were used here by Communists in an entirely different meaning, according to the testimony—

Mr. Gladstein: I object to that.

The Court: —which the jury may or may not believe. That is up to them.

Mr. Gladstein: I submit your Honor's statement is not correct, and I therefore—

The Court: I say it is correct.

Mr. Gladstein: I assign it as erroneous.

The Court: We have heard a lot of testimony here of words used by the Communists in these meetings and in their literature having a meaning that was different from what I would normally give

to them but whether that is so or not is a question of credibility for the jury.

Mr. Sacher: There is no testimony as to what meaning your Honor would give to any word and there is no testimony that the meanings testified would diverge from your Honor's understanding of words, and I submit we are getting involved in a

--Tr. Tr. 4148--

discussion concerning testimony here which is clearly prejudicial to the defense, and I think, your Honor, that the jury should be informed that they are the sole and exclusive judges of the credibility of the testimony and the meaning of the testimony and are not to be influenced by any observations made by your Honor as to either of those matters.

The Court: Well, I think, after I give instructions to the jury, they are supposed to pay attention to me, and if lawyers, as has been done here, attempt to argue over my shoulder to the jury and, by one means or another, try to induce them to disobey my instructions, I will not have it.

Mr. Gladstein: If your Honor please, you have just commented upon—

Mr. Sacher: Excuse me, Mr. Gladstein.

I have asked your Honor for an instruction to the jury. Instead of that you have not only not issued the instruction but have taken occasion to make an unfavorable reflection on counsel for addressing a perfectly legitimate argument—

The Court: Because you took a position in direct opposition to what I have just told the jury. I told

them there is evidence in the case that words were used which have a different meaning than ordinary

—Tr. Tr. 4149—

meaning, but it was for them to say whether they believe the testimony of the witnesses who told us that. Now, when you are argue just the opposite, and continue to repeat it, you are, in my judgment, attempting to convince the jury that I am wrong and you are right, and that, as I have told you before, is dangerous ground for an attorney to tread on.

Mr. Sacher: If the Court is wrong it can never be dangerous to point it out, I submit; and if the Court is right, then there, surely, is no danger in the matter because the Court will point it out.

I have made just one request, your Honor, and that is that the jury be advised that in matters of testimony, evidence and credibility of the witnesses, they are the sole judges and their recollection alone determines.

The Court: Yes, but you added a little something additional, which you perhaps now forget, namely, that they should disregard what I said on the subject.

Mr. Sacher: So far as their recollection is concerned, am I not correct in saying that their recollection is decisive regardless of your Honor's recollection?

The Court: I will instruct them on all those subjects when the time comes.

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—Tr. Tr. 4207—

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Mr. Wallace: Will you mark that? And this is a copy for the Court. I am delivering a copy for the Court, to the clerk, in addition to the original document, which I am asking to have marked.

The Court: Yes, I am now proceeding to read.

Mr. Crockett: I am very glad to notice that, your Honor.

The Court: What do you mean by that, Mr. Crockett?

Mr. Crockett: I take it you said it for my benefit. You looked directly at me and I wanted you to know that I had heard it.

The Court: Well, I did not look directly at you and I did not mean that for you but for all of the counsel for the defendants, who seem to be sedulously watching and clocking the time I use looking at papers and things of that kind.

Incidentally, I consider that an impertinence.

It may be assumed, when I am looking at papers, and I rule on them, that I read them, without having counsel make remarks of that character.

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—Tr. Tr. 4241—

New York, April 28, 1949

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Mr. Sacher: May it please the Court, I would like to be heard briefly on an objection to the admission of these pages 27 to 96.

The Court: I don't think I desire any argument on it, Mr. Sacher.

Calomiris—
Colloquy

Mr. Sacher: Well, apart from objections, then, permit me to say, your Honor, that the time interval I have asked for has proved to be utterly inadequate. We are not in a position to read 70 pages of historic material and to come up with a determination as to its relevancy, its pertinence to the charge and its—

The Court: You know you had Exhibit 78 in photostat form overnight. You could, with reasonable intelligence, have seen there the reference to Chapters II and III of this book. Following the procedure —Tr. Tr. 4242— that the prosecution has adopted, I should think it would have seemed almost inevitable to you that these two chapters would have been offered.

Mr. Sacher: Nothing of the kind appeared to us, your Honor, and all I know is that when reading material has appeared in outlines and we have tried to offer them, they have been sedulously kept out of the record, so we don't know what they are going to offer—

The Court: Well, I see no matter what question is discussed you always carry on in that way—

Mr. Sacher: I wish to object to that. I am not carrying on.

The Court: So I am going to let him read such pages as he wants—let us not argue. I will not have any argument about it. I will overrule your objection.

Mr. Sacher: I wish, however, to take exception to your Honor's words as to how I am "carrying on." I am not carrying on. I simply tried to state to your Honor why it was impossible for us to ad-

vise your Honor as to our position on these 70 pages, with intelligence.

The Court: Very well; the objection is overruled.

Mr. Crockett: If the Court please, I object to this entire procedure whereby some 70 pages of printed matter are offered in evidence without—

—Tr. Tr. 4243—

The Court: Do you recall, Mr. Crockett, that I ruled that there should be no argument?

Mr. Crockett: I am making no argument. I am stating my objection.

The Court: You are arguing. If you persist, you do it contrary to my direction.

Mr. Crockett: I have no desire to go contrary to the Court's direction, but I do object to this entire procedure.

The Court: Very well, objection overruled.

(Marked Government's Exhibit 30-E in evidence.)

Mr. Sacher: I just wish the record to show an objection to the admissibility of these specific pages.

The Court: I am sure the objection is noted on the record.

—Tr. Tr. 4400—

New York, April 29, 1949

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Mr. Sacher: She hasn't said that.

The Witness: I asked if I might read it.

The Court: Can you tell without reading it whether you signed it or not?

The Witness: It resembles my signature.

The Court: Don't you remember the occasion of signing a paper like that?

Mr. Wallace: Your Honor, I don't see how she can answer that without reading the paper.

The Court: Mr. Sacher says she can't.

Mr. Gladstein: But the fact is she has been reading it.

The Witness: I haven't been able—

The Court: There is so much discussion she can't read it.

You mean to tell me you can't tell whether you signed that until you read it all through?

The Witness: Yes, your Honor.

The Court: All right then, I will let you look it all through.

Mr. Gordon: Mr. Sacher thinks that this is very funny.

Mr. Sacher: I do.

The Court: He is a great fellow. There is no ques-

—Tr. Tr. 4401—

tion he can give more indication of what he thinks about by tittering and laughing and giggling.

Calomiris—Cross
Colloquy

Mr. Sacher: I move that that be stricken on the ground it is utterly unwarranted and not founded on the record and solely as a diversion.

The Court: I take it that that is intended to be another imputation on my motives, Mr. Sacher. You are piling up quite a record for yourself in this case.

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—Tr. Tr. 4588—

New York, May 3, 1949

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Mr. Wallace: I object to this, reading from a document not in evidence.

The Court: Yes.

Mr. Gladstein: I am identifying it.

Mr. Wallace: You can identify it otherwise.

The Court: You see, by reading it that way it becomes immaterial whether it is in evidence or not because you get it in anyway, which is the reason why you should not do it.

Mr. Gladstein: I cannot get the article in by referring to the title.

The Court: You can show her the paper and ask her if she has seen it before, or noticed that particular part that you want to call her attention to, without—

Mr. Gladstein: All right.

The Court: —indirectly getting before the jury something that is not yet in evidence.

Q. I will ask you to state if you find on the title page an article by Jacques Duclos?

The Court: The question is—

Mr. Wallace: That is exactly what counsel has

—Tr. Tr. 4589—

been directed not to do, and he proceeds to do it.

The Court: Yes, it is. It is, Mr. Gladstein; it is just what I told you not to do.

Mr. Gladstein: What am I supposed to do?

Mr. Wallace: I will be glad to teach you.

The Court: Show it to her and ask her if that refreshes her recollection as to whether she had not heard the name Duclos before.

Mr. Gladstein: All right.

The Court: And see what she testifies.

Mr. Gladstein: Very well.

Mr. McGohey: I assume this document has a name and there is a paging?

The Court: Yes.

Mr. Gladstein: All right.

Q. I will call your attention—

The Court: But, you see, after all this discussion, my rulings become futile. You may go ahead and do just what I told you not to do because everybody knows now the name Duclos is on there, so it is ridiculous for me to try to say anything more about that. So go ahead now, show it to her, read it all you want, and then let us see if she noticed it there before

the time that she said she heard of the name for the first time.

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—Tr. Tr. 4715—

New York, May 4, 1949

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Mr. Sacher: May it please the Court, we object to the offer of this exhibit, not on the basis of what its contents are, but on the many grounds that have already been urged as to its non-admissibility, including the fact that this constitutes surprise in view of the request made and denied for a bill of particulars.

The Court: Are you cognizant of the fact that I have directed that counsel should merely say they object and, if they desire to state reasons, ask leave of the Court to do so?

Mr. Sacher: You have my apology, your Honor.

—Tr. Tr. 4716—

The Court: Thank you.

Mr. Sacher: I did not intend to violate the ruling.

The Court: I will overrule the objection.

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—Tr. Tr. 5104—

New York, May 9, 1949

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Q. Mr. Cummings, tell us what happened at this meeting at Toledo. A. At—

Mr. Gladstein: Objection on the ground that it is all hearsay, your Honor.

The Court: Very well; overruled.

—Tr. Tr. 5105—

A. (Continuing) At this meeting Mrs. Adeline Kohl gave a report and she said that she also urged that the membership accept the National Board's resolution and during her report she was interrupted by one fellow, Mr. Paul Prosser, and he said that roughly we had estimated that the revolution in America is ten years off but due to world's conditions "I feel that it is much closer," and Mrs. Adeline Kohl said, "I agree that it is much closer. At this time due to the leadership we give the working class in America to bring about a fight for a proletarian revolution"—

Mr. Gladstein: Just a moment. I move that all this be stricken.

The Court: Why?

Mr. Gladstein: May I state the grounds?

The Court: Yes, unless you want to make a speech about it.

Mr. Gladstein: It is not a question of a speech. I haven't heard it said that any defendant was present.

The Court: I suppose you heard the news about testimony relative to co-conspirators being admissible?

Mr. Gladstein: If your Honor please, where is there a charge about co-conspirators or alleged co-

—Tr. Tr. 5106—

conspirators? These 11 defendants, as I recall what your Honor said originally, are the ones that are being tried. It is these 11 men that are being tried.

The Court: I thought you were going to make a speech.

Mr. Gladstein: Your claim is that the Communist Party is not on trial.

The Court: My claim? I suppose you have rested up for a couple of days and are now back in the arena; so you go ahead and say the rest of it.

Mr. Gladstein: Whether I am rested or unrested I am making a legal objection.

The Court: Why don't you make the argument in a legal way?

Mr. Gladstein: My ground is, in answer to your Honor's point on the question of co-conspirators, if that is the ground upon which your Honor permits this testimony in the case, then what happens to the contention that is here made, namely, a denial that the Communist Party as such is on trial and its ideas and all of its members?

The Court: If you think you are going to get into an argument with me you are just fooling yourself. I am listening to you. Go ahead and argue

all you want, but I am not going to bandy words with you.

Mr. Gladstein: I have made my objection.

—Tr. Tr. 5107—

The Court: The objection is overruled.

Q. Mr. Cumming, does Mr. Prosser, the man you say asked this question of Mrs. Kohl, hold any office in the Communist Party? A. Mr. Prosser?

Q. Yes. A. He was on the county committee at that time.

Q. Of what county? A. Of Lucas County.

The Court: Mr. Reporter, will you read that previous answer to me, the part about the revolution?

Mr. Crockett: Isn't that the part you just sustained an objection to?

The Court: If I sustained an objection to it I must have misspoken himself. I meant to overruie the objection.

Mr. Crockett: But my point is that there was a motion to strike and you overruled a motion, is that right?

Mr. Shapiro: As I recall, there was an objection.

The Court: I denied Mr. Gladstein's application, but I am going to get in my head and down in my notes what the witness said so when we get all through I am going to have it read. Don't make any mistake about that. If you want to claim for some reason or other my getting it down in my notes is improper—

Mr. Crockett: I make no such claim. I merely

—Tr. Tr. 5108—

want the record to show a motion was made to strike that particular testimony, your Honor overruled it, and now your Honor wants it read.

The Court: I want it read because I want to get it down in my notes and I am going to do that.

Mr. Gladstein: I want to object to the Court's innuendo.

The Court: Oh yes, yes.

Mr. Gladstein: In the Court's statement and the manner and tone in placing that before the attorneys for the defendants. I make that objection and I ask your Honor to advise the jury to disregard it.

The Court: Disregard what?

Mr. Gladstein: The statement that your Honor made and the implication and innuendo that it carried.

The Court: I haven't the remotest idea what you are talking about.

Mr. Gladstein: I will be very happy to tell you.

The Court: Go ahead.

Mr. Gladstein: One of the attorneys rose to ask a question of the Court and your Honor distorted that question by asking another question, the purpose of which was to convey an implication that the question of the attorney was improper, that the attorney was indeed impliedly stating something that reflected on

—Tr. Tr. 5109—

the Court's motives and the Court seized that opportunity to make that kind of innuendo.

The Court: Pretty ingenious.

Mr. Gladstein: It was; but not mine.

The Court: You are trying to throw some more imputations on my motives and showing what I thought in the first place was evidently was well justified.

Mr. Gladstein: I made an objection and I ask for a ruling.

The Court: Yes, your motion is denied.

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—Tr. Tr. 5160—

New York, May 10, 1949

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Mr. Crockett: If the Court please, I have a few preliminary cross-examination questions I would like to put to the witness on this document.

The Court: Now? I don't see any occasion for it at this time.

Mr. Crockett: In that case, then, in view of your Honor's denial of our opportunity to cross-examine the witness, I suppose all we can do is simply state we object to the receipt of this document in evidence.

The Court: I don't know what you mean by that

—Tr. Tr. 5161—

expression "all we can do." If that is some further imputation on my motives, why, I suppose I cannot very well stop it.

Mr. Crockett: It is not an imputation on your Honor's motives. It is just that it is necessary to elicit—

The Court: Why don't you just object without making these impertinent comments?

Mr. Crockett: Because when I object I like to do so intelligently and, in order to lay the necessary basis for my objection, I want to cross-examine the witness.

The Court: Well, I have denied that right as I see no occasion for it.

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—Tr. Tr. 5260—

New York, May 11, 1949

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The Court: Let the record show that the jury is present and the defendants and the attorneys for the defendants, with the exception of Mr. Sacher, Mr. Isserman and Mr. McCabe, concerning whom a stipulation is in course of signature and filing, and the attorneys for the Government are present.

Now the other day I said that I was having an examination and study of the record made as to the amount of argument made by defense counsel and I find that of 8860 pages of record from January 17 no less than 1554 pages represent argument by defense counsel, not counting the testimony, what was said by the attorneys for the Government, or by myself.

Now you may proceed, gentlemen.

Mr. Gladstein: Just a moment, your Honor. May I ask the purpose of the Court's announcement?

—Tr. Tr. 5261—

The Court: Yes, you may.

Mr. Gladstein: And I do.

The Court: Now you know I have been required according to my view of the matter to rule that the attorneys for the defendants should merely state "I object" and not give any reasons or argument without leave of the Court. There have been various protests of one kind or another by you and your colleagues, and I thought I should have the record show the fact that I have just indicated.

Mr. Gladstein: I submit in the first place that any such announcement by the Court under the circumstances is improper.

The Court: Well, I suppose that is some more judicial misconduct.

Mr. Gladstein: I submit that it is misconduct and that it is improper. In the second place, I want to ask your Honor whether the 8860 pages your Honor refers to covers that portion of the case involving the challenge to the array?

The Court: Certainly it does. It includes everything from January 17th.

Mr. Gladstein: Then I submit the injustice of the remark is compounded. I submit it was improper for your Honor to make that statement.

—Tr. Tr. 5262—

The Court: It would have been better if you hadn't argued so much.

I have had perfectly good reason as anybody could see or observe for making my ruling, and you remember only yesterday although I again indicated that you should only state "I object" and then ask my leave to argue you went ahead arguing and then when I asked you whether you had forgotten my ruling in the matter, why; you rather hemmed and hawed and said very little, and I thought I better put this statement on the record, and there it is. You protest against it?

Mr. Gladstein: I assign it as misconduct.

The Court: You say it is judicial misconduct?

Mr. Gladstein: I assign it as misconduct and I ask your Honor to instruct the jury to disregard it.

The Court: I will instruct the jury when I come to it, if that time comes, as I have instructed them in the beginning of this trial, and I may have occasion to do it again.

Mr. Gladstein: My request—

The Court: Wait until I tell you what I am going to tell them—what I am telling them now.

Now ladies and gentlemen of the jury, you remember earlier in this case I told you that you were to decide this case on the evidence that you get from

—Tr. Tr. 5263—

the witness stand and the exhibits that are put in. Don't permit anything that is said or done by defense counsel or any colloquy that I may have with them in such matters affect your judgment in any manner whatsoever. That is not evidence; it has got nothing to do with your determination and rendering of a verdict in this case. And so to that extent I tell you

pay no attention to what arguments may be advanced or what may be said by defendants' counsel except in so far as they bear on your determination of the facts, and similarly disregard any comments that I make and colloquy that I have with them. Those things aren't evidence.

You are going to decide this case, if I ultimately submit it to you for your consideration, upon the evidence that comes in and on nothing else. And when lawyers argue, as they will at the close of the case, you will naturally pay careful attention to all those arguments as they may, and doubtless will, help you in your determination of the verdict based on the evidence.

Mr. Gladstein: Now I want to assign the remarks of the Court as misconduct for two reasons—

The Court: You mean what I have just said?

Mr. Gladstein: Yes, your Honor. In the first place

—Tr. Tr. 5264—

because your Honor singled defense counsel out very noticeably.

The Court: I did not intend to do any such thing. I am talking about all the counsel here.

Mr. Gladstein: Well, I may point out, your Honor, that Government counsel was conspicuously omitted from your remarks, but more important than that—

The Court: Well, I include them now.

Mr. Gladstein: Your Honor, my assignment of misconduct was at the remarks of the Court, and I therefore submit it was improper for the Court in making—in giving any instruction to the jury on that subject, to do so in the manner that your Honor just

did, and I assign therefore your remarks as misconduct.

The Court: Well, I must be very bad, all these misconducts that you have charged, and, I must say it is very sad.

(Defendant Dennis stood up.)

The Court: Now what have you to say, Mr. Dennis?

Defendant Dennis: I would like at this time to move for a mistrial because it seems to me that the remarks of your Honor are judicial misconduct, so highly prejudicial that it is impossible to obtain a fair trial, and I would call to the Court's attention that your observations here are not only directed

—Tr. Tr. 5265—

against counsel of the defense and the attorneys per se, and incorrectly, in my judgment, unjustly, but they are also directed against the defendants and in effect deprive the defendants who are represented by various counsel from a general and adequate and full representation.

The Court: You remember the day, Mr. Dennis, when you faced me up and down and refused to stop arguing and I had to leave the bench for five minutes, so that you could cool off a little bit, and then I came back and you stopped? Do you remember that day?

Defendant Dennis: I remember the day but I don't join in the interpretation which—

The Court: Do you remember me telling you to stop arguing again and again and you went right on—

Defendant Dennis: I also remember, your Honor, that you stated if I wished I could continue, and I did continue and it would seem—

The Court: Well, your recollection is a little bit different from mine; but, anyway, when I tell the jury, as I did just a moment ago, to disregard those things, to disregard the conduct of counsel and not permit it to prejudice them in any way against the defendants, not to consider such matters against the defendants, I gave that instruction to help them, not to hurt them as you seem to suppose.

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—Tr. Tr. 5310—

Mr. Crockett: If the Court please, may I make a statement on the record? I notice that Exhibit 119 has just been collected from the jury. I also notice that at 12.17 the original was given to the jury. At 12.20 a photostatic copy was also handed to the jury, and at 12.29 the jury completed its consideration of that 9-page document.

The Court: Well you know, that is like this timing of me that you had been doing earlier in the trial. Now you know some people read faster than others. Some people read one part or another part, and I don't see why you have such things as that noted. I didn't watch to see whether your statement is substantially accurate, but I think that the jurors have the right to look at such parts of the exhibits as they desire to look at. It isn't necessary for them, each one, to read every word of the papers. I don't think you ought to do that.

Mr. Crockett: Your Honor, I point out the impossibility of any juror giving adequate consider-

ation, within the time limit, to all of this documentary stuff that the Government is putting into evidence.

The Court: Well, I note your objection, or whatever it may be considered, but I don't see any difference in this trial from others, and the jurors may look at the exhibits to the extent that they desire

—Tr. Tr. 5311—

to look at them.

(Mr. McGohey rises.)

The Court: Yes, Mr. McGohey?

Mr. McGohey: May I point out to your Honor that this Exhibit 119, which is the subject of Mr. Crockett's observations, that at the time it was received Mr. Shapiro read the first—read to the jury the first half of the first page; he omitted the second page, the third page, and a half of the fourth page, and that thereafter he read everything else in the exhibit except these two tables—or one table, rather.

The Court: Yes. It is reasonable to suppose that the jurors remember at least a part of what Mr. Shapiro read.

Mr. McGohey: I should think so, your Honor—

The Court: Yes.

Mr. McGohey: —in view of the fact that it happened only a very short time ago.

The Court: That is right. I think if there is going to be some timing, Mr. Crockett, you had better let me know when the timing is going on and I will do the timing, or have the clerk do it, because I didn't know you were doing that and I don't like to have

counsel make statements that I have no way of checking at all, and I think if you are going to do some

—Tr. Tr. 5312—

timing you had better let me know and then I will do the timing.

Mr. Crockett: May I suggest to your Honor that both of us be relieved of that responsibility and let the court reporter be directed by the Court to mark on his record the time that each time passes.

The Court: I certainly will not make any such direction. I never heard of such a thing.

Mr. Crockett: In that case I will have to interrupt the proceedings to let your Honor know that I am taking the time.

The Court: Well, it is perhaps better to let you time it, whenever you want, and you can make such statement as you want, and the jury may give it such consideration as they think it deserves. I will take back what I said about telling me when you are doing the timing. You can do the timing any time you want, on me, on Mr. McGohey, on the jurors, on the witnesses or anyone else, and then you can make such statement as you need to and we will let it go at that.

. . . . . .

—Tr. Tr. 5361—

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Then, going over to the last section of the exhibit we find that it is headed "Concentration Objectives.

"The building and strengthening of following 22 club"—

I assume that means "clubs"—

"in basic industries and key plants as state concentration objectives. (See A) below).

"The fulfillment of our concentration goals must serve as the main measure of the success of our party work. They must receive top priority in terms of the human and material resources of our Party. (See B) below).

"A) Concentration Points:

Cleveland—White Motor, Republic, Lorain, Alcoa, G. E."—

and undoubtedly that is General Electric, your Honor—

"Youngstown—Republic, S. & T."—

undoubtedly standing for "Sheet & Tube"—

Mr. Gladstein: Your Honor, it seems to me—I don't know about this "undoubtedly" business, but I think it may be well—

The Court: I think you had better leave out the

—Tr. Tr. 5362—

description.

Mr. Gladstein: Or ask that of the witness.

The Court: Yes, I think that's right. I think the GE—it seems plain to me, but it may not be. Better ask the witness if he knows and then, if he doesn't, prove it in some other way.

Cummings—Direct
Colloquy

Mr. Gladstein: Well, of course, asking the witness those questions now, I think, is hardly worthwhile. I would suggest in the future—

The Court: You mean that the witness will lie because he has heard this discussion and make out that he knows when he doesn't? Do you mean that?

Mr. Gladstein: I object to that.

The Court: If you mean that, you are wrong.

Mr. Gladstein: I object to that statement of the Court.

The Court: I won't have this kind of talk. Every time there is a witness on the stand you say, because there has been a discussion and he has heard the discussion that, of course, he will lie about it.

Mr. Gladstein: I didn't say that, and I object to the statement—

The Court: That is what you meant.

Mr. Gladstein: —in the presence of the jury and assign the manner and the contents of your Honor's

—Tr. Tr. 5363—

statement as prejudicial misconduct.

The Court: Very good.

Mr. Gladstein: And I ask your Honor to advise the jury to disregard the expression—

The Court: Witnesses do not have to be insulted here.

Mr. Gladstein: Your Honor, may I finish my assignment of error?

The Court: Oh yes, you can go ahead and call me anything more that you want to. I am used to it by now.

Cummings—Direct
Colloquy

Mr. Gladstein: And I assign that as error because I did not call your Honor anything, and I also assign as prejudicial misconduct the statement your Honor just made to the effect that I was saying something about the witness, which wasn't true. Now, I ask your Honor—

The Court: When you say that I make statements that are untrue, you transcend the bounds of propriety of conduct of members of the bar.

Mr. Gladstein: I didn't make that statement, if your Honor please.

The Court: Well, I just heard you make it. What's the use of telling you didn't?

Mr. Gladstein: I submit the Court's last remark is prejudicial misconduct.

Now, I ask that the Court instruct the jury—

—Tr. Tr. 5364—

The Court: Next thing you will be saying what I am thinking is prejudicial error.

Mr. Gladstein: I beg your pardon?

The Court: I say, the next thing you will be doing is saying what I am thinking is prejudicial error.

Mr. Gladstein: I assign the statement that your Honor just made as prejudicial error, and I ask your Honor to advise the jury to disregard that statement as well as the others, concerning which I have made an assignment.

The Court: Well, I make the same direction to the jury that I made this morning. These little passages between counsel and myself, whether they be counsel for the defendants or for the prosecution, do not

form evidence in the case. You are not to base your verdict upon such matters at all. You are entirely to disregard them and to base your verdict, when the time comes, upon the evidence that you receive from the witnesses and in the documents that are submitted.

. . . . . .

—Tr. Tr. 5440—

New York, May 12, 1949

Q. Now was there any discussion at that time about your compensation for being a stoolpigeon? A. No, no—no discussion about compensation for being a stoolpigeon was being discussed.

The Court: He didn't say "Now you stoolpigeon, you are going to get so much."

The Witness: No.

Mr. Gladstein: Now, if your Honor please, I object to the Court's remarks and the form in which this is put. May I say that I do not regard it as a matter that warrants levity on the part of the Court to ask that sort of a question and present that kind of interference when the subject being discussed—

The Court: Did you hear the question that Mr. Crockett asked?

Mr. Gladstein: —of being a stoolpigeon. Now I heard the question that your Honor asked—

The Court: No.

Mr. Gladstein: —which I submit was improper, and I ask your Honor to advise the jury to disregard that. Your Honor constantly interferes with

cross-examination in a manner that is intended to take the edge off the examination, a statement which I have heard your Honor make against us. Now I want to say this—

The Court: You naturally don't want to have any-

—Tr. Tr. 5441—

thing go by without telling me about my judicial misconduct.

Mr. Gladstein: Your Honor, if—if in my judgment with whatever wisdom God has given me and whatever experience I have, I think that the defense of my clients requires me to stand up and object to a statement that I believe sincerely to be improper on the part of the Court, then it is my duty and my job to do so, and I offer no apologies for doing that, and therefore as long as your Honor continues to present that kind of interference, to try to make light of the subject of spying, whether it be upon unions or political organizations or any kind of organizations and to try to take the whole cross-examination—

The Court: I suppose you will be some little time arguing this point, will you?

Mr. Gladstein: Your Honor, I had not intended to make any argument.

The Court: Well, you see it is always that way, you do not intend to do it but then you go on and on. What you meant to do and what you did was to object to my question, to ask that I instruct the jury to disregard it, which I refuse to do.

Mr. Gladstein: And I assign—

The Court: Now the rest of it becomes, as I look at it, argument, which I have sought to avoid here.

—Tr. Tr. 5442—

Mr. Gladstein: Well, I shall refrain, but I want to assign your Honor's remarks as misconduct, and also the rulings of the Court as misconduct.

The Court: Well, I am getting used to that now, so it is all right.

Mr. Gladstein: I assign the remarks that your Honor has just made as misconduct.

The Court: But I am getting used to it.

Mr. Gladstein: Your Honor, whether you are used to or not used to having the remarks of the Court assigned as improper has nothing whatsoever to do with the issue of law presented by an attorney when he makes an assignment of error, and I submit that for your Honor to constantly use that kind of expression in the presence of the jury has the effect of making it impossible to obtain a fair trial. Now I am not saying that your Honor intentionally makes the statements to deprive the defendants of a fair trial, but I do beseech your Honor to consider that, in my judgment at least, and in the judgment of the defendants and the other lawyers, it becomes impossible as a matter of fact to have fair play with your Honor constantly making this kind of remark.

The Court: Well, Mr. Gladstein, I have determined that this trial is going to be held in an orderly

—Tr. Tr. 5443—

and proper way, and I don't intend that a single one of you lawyers for the defense shall get away with anything while I am sitting here. I am not

going to do any shouting or thumping or holding people guilty of contempt or doing anything that will make a big rumpus, but I am not going to let a single one of you get away with a thing, and every time there is some little crack you will find that is the time that I speak up, because I am not going to let you gentlemen take over the courtroom as you have repeatedly tried to do. Now that's all beside the evidence. It has got nothing to do with what the jury has to decide at all. You need have no concern that they will mistake it because they will not.

Now please let us go on with the cross-examination.

Mr. Gladstein: All of your Honor's last remarks I assign as judicial misconduct. I ask your Honor to advise the jury to disregard it.

The Court: I refuse to do so.

Now go ahead, Mr. Crockett.

By Mr. Crockett:

Q. I believe you testified that nothing was said about compensation at the time of this fourth visit in January 1943, is that right? A. That's right.

—Tr. Tr. 5444—

Q. But you did agree to become a stoolpigeon for the FBI?

Mr. Shapiro: Objection, your Honor.

The Court: I will sustain the objection.

Q. You did agree to become an informer for the FBI?

Mr. McGohey: I object to that.

The Court: The same ruling.

Mr. Crockett: Your Honor, what is wrong about the word "informer"?

The Court: Well, are you just trying to start this thing again so that then Mr. Gladstein will get up and so we go to it—

Mr. Crockett: Now I want to object to that.

The Court: You have already asked what was said; you got it all out here. Now I am a little bit inclined to think there is a little bait around here now, and I think you had better just drop that and go on and ask a question that I allow. I have sustained the objection to the last two questions.

Mr. Crockett: I want to object to the Court's remarks.

The Court: Very well.

Mr. Gladstein: May I interrupt a second? I want to assign as misconduct on the part of the Court the remarks of the Court concerning bait.

—Tr. Tr. 5445—

The Court: Well, I am apparently the one that the bait is held out to most of the time and I don't intend to take it.

Mr. Gladstein: I ask your Honor to advise the jury to disregard the remarks that your Honor made concerning the spreading around of bait, or whatever your Honor's expression is.

The Court: Well, it does seem to me, Mr. Gladstein, that you and your colleagues, not just today,

not just for a week or two, not even for a month or so, but for several months have been trying to bait me. Now I have told you repeatedly that it is useless. You are not going to provoke me. You are not going to get me angry about it. I just won't do it, but I think it is about time to stop that sort of thing. Now you have tried it again and again by talking about stoolpigeons, and so on and so forth. Now he has already got out what happened in this conversation, and I have sustained the objection to the last two questions which had the words "stool-pigeon" and the word "informer" in and which seemed to me to be just matter of provocation, and so we will go on.

Mr. Gladstein: Your Honor, I assign as misconduct the remarks that the Court has just offered concerning what has gone on the last month or the

—Tr. Tr. 5446—

last two months, or anything of that sort.

The Court: Well, we all know what it is.

Now go ahead, Mr. Crockett.

Mr. Crockett: I should like to remind the Court that this witness has previously testified that he agreed to become a quote informer end of quote for the FBI.

The Court: Then why did you have to ask such a question? That puzzles you, doesn't it?

Mr. Crockett: Shall I answer that, your Honor?

The Court: Well, you may if you choose.

Mr. Crockett: Perhaps under the circumstances I

had better not.

The Court: Well, I will take the thought for the deed.

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—Tr. Tr. 5460—

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Q. You have never reported to the Federal Government the moneys that you received from the FBI? A. I did not. Never have reported.

The Court: Why should he, Mr. Crockett?

Mr. Crockett: Let me object, first, to your Honor's question, and unless your Honor—

The Court: The question rather seems to indicate that there was a duty under the law to include those things and, as I understand the income tax law, you do not put in your return when you are reimbursed for expenses, you put down your earnings, your income, and I thought perhaps you had some theory about this that might enlighten me, and so I said, "Why should he put them in?"

Mr. Crockett: I want to object to the last statement.

The Court: Is it possible that you will get around to answering my question in due time, "Why should

—Tr. Tr. 5461—

he put them in?"

Mr. Crockett: If your Honor directs me to answer the question, I will do so.

The Court: I don't give you any direction. I am just asking you. If you don't want to answer it, why,

we have had enough of that before, I am used to it.

Mr. Crockett: In that case I consider the question an improper one coming from the Court at this time—

The Court: All right.

Mr. Crockett: —and for that reason I don't answer.

The Court: Very well.

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—Tr. Tr. 5725—

New York, May 17, 1949

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Mr. Sacher: I would like to make the point, your Honor, I wasn't concerned about the smile but I think it is a matter of the utmost gravity for a man to recruit his brother-in-law into the Communist Party and then report that fact to the FBI.

Mr. McGohey: Now I object to that, your Honor. That is a matter for summation.

Mr. Sacher: That is no smiling matter.

The Court: Now, Mr. Sacher, you are beginning to make comments that are not proper, and I have told you again and again that the time to argue is when you come to your summation. Now I am just not going to tolerate that sort of thing, and I hope you will bear it in mind.

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—Tr. Tr. 5808—

New York, May 18, 1949

Mr. Sacher: I object to this, your Honor—

The Court: Overruled. Mr. Sacher, I will not hear from you further.

Mr. Sacher: —unless the time and place are fixed, your Honor.

The Court: Overruled. You needn't smile and sneer at me that way either.

Mr. Sacher: I wish to state that I did not sneer or smile.

The Court: I am not going to have any more of that than I can help, I will tell you that.

Mr. Sacher: That is all right, but I just wish the opportunity to state my objection properly.

The Court: Well, will you please try to control yourself.

Mr. Sacher: Well, there is no need to control myself. I stated an objection.

The Court: I saw you smile and sneer, and you have done that repeatedly and I won't have it

Mr. Sacher: I think that is not a correct characterization of what I did.

The Court: Well, naturally you wouldn't be expected to admit it.

Mr. Sacher: I object to that statement.

The Court: Very well.

—Tr. Tr. 5826—

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The Court: Overruled. And I may say, Mr. Sacher, that I have observed lately some disposition to do what I thought was to delay the proceedings here, and I am contemplating the taking of some steps to expedite the case.

Mr. Sacher: Does your Honor make that observation in light of objections made to questions asked?

The Court: I do.

Mr. Sacher: May I note an objection to your Honor's observation?

The Court: No, you will have just what I stated and bear it in mind. I am not going to have this matter go on forever, and I am, just as I have on numerous occasions before in this case, giving you and your colleagues ample warning, and I tell you now, as I did a moment ago, I am contemplating certain steps to expedite the matter. Now you may just think that over, and I am not going to say anything further about it now, but when I do take those steps I hope you will not feel surprised.

(To Mr. Dennis, who was standing) Now, yes, Mr. Dennis, what have you to say?

Defendant Dennis: Is your Honor trying to intimidate the defense and counsel for the defense?

The Court: I am afraid I am not very good at

—Tr. Tr. 5827—

intimidation, but I have had a lot of it tried on me in this case.

Defendant Dennis: What is the purpose of your threat?

The Court: My purpose is to indicate, as I said, that I have observed a number of things here which have impressed me as having been done solely for purposes of delay, perhaps to drag out this case for an indefinite period; and before I do anything further than what I have already done in that matter, I thought it well to give counsel some warning because it is the conduct of counsel that has caused me to reflect on the matter, and so I have given this indication.

Now, for example, I have observed as to exhibits, that an extremely long period is taken for the passing around of the exhibits, turning them over and over and passing them around, and 20 minutes or a half hour go by; and it seems to me that perhaps we can be a bit more expeditious.

Now that is all there is to it. If there is something you wish to say you may say it.

Defendant Dennis: Well, I can only construe the remarks of the Court as highly prejudicial to counsel and the defendants, as an effort to try and intimidate us; but I can assure the Court that we of

—Tr. Tr. 5828—

the defense are not going to be intimidated.

The Court: I don't think you can be intimidated, Mr. Dennis.

Mr. Dennis: I am glad the Court understands that.

Mr. Sacher: I should like to place on the record the fact that your Honor said to me that you would commend the defense because of the manner in which cross-examination was being expeditiously conducted.

The Court: Did I say that?

Mr. Sacher: Yes, you did.

The Court: Well, the record will speak for itself.

Mr. Sacher: And I mention that only because it seems to me that having complimented us on the expedition with which we were acting that it seems, particularly in view of the fact that your Honor was handing out the admonition on the basis of objections made this morning and your reference to the examination of exhibits in your colloquy with Mr. Dennis, I don't understand it; and I should like also to add that never in this case, never, lengthy as the exhibits have been, has the defense taken as long as 20 or 30 minutes to examine exhibits.

The Court: Well, you see, issues of veracity between the Court and counsel are distasteful but when they occur we must meet them. Now let's drop the subject and go on.

—Tr. Tr. 5829—

Mr. McCabe: I should like to put on the record my objections to the strictures as to any lengthy examination of exhibits by counsel. There are eleven defendants and five counsel, and I believe if we have erred we have erred to the point of shortening our examination of exhibits, except in some cases, to the detriment of our clients. The Government is never censured nor does it hasten the examination of its exhibits.

I say, this morning, your Honor, after giving this warning, which I think is—

—Tr. Tr. 5830—

The Court: You know, I have given a number of similar warnings in the past in this case, and in every such instance I acted when I was forced to act. Now you can go ahead and talk if you wish to, but I think it is more profitable for you to just ponder on what I have said and guide your conduct accordingly. Now why don't you take that to heart, Mr. McCabe, and think about it. You have had a nice rest, you have been away for a few days or a week or so. I think if you will just take it easy and let's go on it will be better.

Mr. McCabe: Your Honor, I have not been away for a rest, nice or otherwise.

The Court: Let's argue about that then.

Mr. McCabe: If your Honor chooses to take testimony on that it is readily available. But I would like to call your Honor's attention to the fact that today after stating an admonition you said that your remarks were directed to objections taken and you immediately digressed from that and you go back to a point of examination of the exhibits when certainly that is not directed to anything that happened today.

The Court: I didn't confine my remarks to objections at all. As a matter of fact the objections were one of the rather less important items. But when Mr. Sacher questioned me about that I naturally

—Tr. Tr. 5831—

said yes the objections had something to do with it because I have observed particularly on the direct

examination of witnesses when they are getting into their testimony there is such a barrage of objections and interruptions that it can scarcely seem believable to me that if counsel simply wishes to make a record of an alleged error that such repetition would be necessary, but perhaps it may be. All I am telling you is you better watch your step.

Mr. McCabe: We have asked, your Honor, that our objections be directed to an entire line of testimony when it is obvious that the objections would be similar to various phases of that testimony. Your Honor declined.

The Court: That is right, I take no blanket objections. I am going to pass on things as they come up.

Mr. Sacher: What is the alternative, your Honor?

The Court: As I understand the law, Mr. Sacher, if you object on one point and get an adverse ruling that exception is just as good as a thousand.

Mr. Sacher: Why don't you permit the objection to stand?

The Court: I will not take a pig in a poke by saying I will allow an exception to some general line because my experience has been that that is unprofitable and led to misunderstandings.

—Tr. Tr. 5832—

Now you see what little things lead to so much discussion?

Mr. McCabe: This is not a little thing. This has gone on throughout the entire record.

The Court: It is due to the fact that you lawyers keep this up as you are doing, which is some further evidence in my mind that you want to keep this ball rolling indefinitely in this case.

Mr. McCabe: That has no basis in fact, your Honor; but the fact is, if we sat here and allowed your Honor's strictures to go on the record without comment, someone, even a jury, might get the idea that we accepted those strictures or agreed with your Honor, and I have said—

The Court: You know, the jury has been told by me repeatedly that these little colloquies have no bearing on the issues that they have to decide and they are to put them out of their minds entirely.

Defendant Potash: The jury consists of human beings, your Honor, and you cannot say that they will just disregard that.

The Court: This is Mr. Potash, isn't it? Isn't this Mr. Potash?

Defendant Potash: Yes, this is Mr. Potash.

The Court: You seem to be of the same general

—Tr. Tr. 5833—

character as your colleague Mr. Gates there, but is there anything else you wish to say?

Defendant Potash: No, that is all I have to say, your Honor.

Defendant Green: I would like to say something, your Honor.

The Court: Now, let me see—

Defendant Green: It seems to me your point of view—

The Court: —this is Mr. Green, isn't it?

Defendant Green: Yes, this is Mr. Green.

The Court: And you have some comment that you don't desire to leave to your lawyer to make, is that it?

Mr. McGohey: Would your Honor hear me for just a minute?

The Court: Yes. Mr. Green, would you mind, just as a favor, to resume your seat for a moment until I hear from Mr. McGohey?

Yes, Mr. McGohey.

Mr. McGohey: If the Court please, I would like to move at this time, if I may, for a short recess.

The Court: Very well. We will take a ten-minute recess.

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—Tr. Tr. 5883—

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Mr. Sacher: I object to that as being a repetition—an unnecessary repetition of the testimony.

The Court: Sustained.

Mr. Sacher: That was sustained, your Honor?

The Court: Yes.

Mr. Sacher: I am agreeably surprised.

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Colloquy

—Tr. Tr. 6025—

New York, May 19, 1949

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Mr. McGohey: And at this time the Government rests.

Mr. McCabe: Will your Honor indulge us?

The Court: Would you like me to take a ten-minute recess now?

Mr. McCabe: Yes, I think so. We will have some motions to make.

The Court: Do you think that the motions will require much argument? Do you desire time for argument? Because I don't think that such motions should be argued in the presence of the jury.

Mr. McCabe: No; I agree.

The Court: And I was wondering how long you expected to take on that.

Mr. McCabe: Well, inasmuch as there are a number of counsel, your Honor, I think the time to be taken might be determined by some agreement among them as to the burden of argument on some particular points which might shorten the argument.

The Court: Well, I will tell you what I will permit you to do. I will permit you to use the balance

—Tr. Tr. 6026—

of the afternoon for such arguments as you desire to present, severally or in any order that you desire. I will now excuse the jury until tomorrow morning, and then I will take a little recess so that you can prepare to make your motions and your argument.

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Colloquy

—Tr. Tr. 6033—

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The Court: I will give no time in addition to what I have indicated, namely, you will make your motions, make your arguments in support of the motions this afternoon.

Mr. Isserman: Now if the Court please, I am aware of what the Court just said but I do feel it neces-

—Tr. Tr. 6034—

sary on behalf of my clients to call to the Court's attention certain aspects of this case which do require the short time that we are asking to get our motions in proper shape for your Honor. I would like to say that the very motion papers on which we have been working and which are not completed but which would aid in the course of our argument are not in court at this point.

The Court: Well, these motions are usually made orally.

Mr. Isserman: And they are being worked on, and the cases that we have in support of them are not in court. I would like to call your Honor's attention also that in the course of the trial, in addition to the number of pages of testimony which have been taken, that the exhibits number somewhat in the neighborhood of 300; that many of them are whole volumes which have to be considered, that none of them were introduced with the exception of maybe one or two, or the constitution mentioned in the indictment, without prior notice to the defen-

dants which they had requested by way of a bill of particulars; that many of the witnesses were produced outside of the Southern District, which also was a matter of surprise, and we so alleged, and again there was timely demand for a bill of particulars which was denied; that to meet the testimony of these witnesses requires more time than

—Tr. Tr. 6035—

we have had up to this point, and while the process of obtaining that testimony is under way, it has not been completed, we had no opportunity to get ready until the witnesses themselves were on the stand and testifying because of the absence of particulars. The study of the documents put in, and the analysis of the testimony which we have been doing requires some additional time for us to make the motions which as a matter of due process we should be entitled to make now, in a way, to present them to the Court as persuasively as we can without undue repetition and without any suggestion of delay, the basic problems of law and fact which have been raised in this case.

I would like to say in addition to the motion for direction of a verdict—or for judgment of acquittal, rather, there is a motion addressed to the dismissal of the indictment on constitutional grounds which your Honor at an earlier stage indicated will be entertained at this point. Now we had no way of anticipating that the Government would rest at this point, and it is not unusual and quite within the course of procedure on a set of facts which involves eleven defendants and five trial counsel to give them

an opportunity, and involving so many—so much documentary material which has been put in—to

—Tr. Tr. 6036—

give them a reasonable opportunity before the submission of their case to present their motions and also to do that additional minimum of preparation needed in connection with the witnesses and matters on which we have been surprised in this case, through no fault of our own, and to compel us, without giving us the short time that we are asking—and in respect to that we do not hold necessarily to the time suggested by Mr. Sacher, but a short—but we do believe that it is within our clients' rights as a matter of due process that there be some reasonable period in which we could prepare these motions and prepare to put our defense on, and we ask your Honor to reconsider the statement that you have just made.

It is a matter of grave importance. The charge is a novel one. It affects—it embraces fundamental constitutional issues, and issues which are of the greatest importance, and under the circumstances, especially and in view of the fact that but a short few minutes remain until the close of this day's session, and there is a half day tomorrow—

The Court: Well, you are using it up yourself asking for a delay.

Mr. Isserman: What did your Honor say?

The Court: I said you are using the time up your-

—Tr. Tr. 6037—

self in order to get this delay that you are seeking.

Mr. Isserman: We are not asking—

The Court: Remember, I have been through this here.

Colloquy

Mr. Isserman: If the Court please—

The Court: I remember the applications for delay, delay, delay, delay, right through all this whole proceeding.

Mr. Isserman: If the Court please, we are not asking for a delay. We are asking for that reasonable adjournment which as a matter of due process we are entitled to.

The question of examining the record in the light of your Honor's rulings that certain parts of the evidence were admissible as to certain defendants, and certain evidence was not admissible as to certain defendants, and certain evidence as to all, requires a short opportunity to present the matters to your Honor, and we believe we have that right to present the matters to your Honor both as to fact and law which may persuade your Honor to act on our motions in a favorable way, and not to treat them merely as motions—

The Court: I haven't even heard them yet. What are the motions?

—T. Tr. 6038—

Mr. Isserman: Well, we expect to make them, and we ask your Honor—

The Court: You want to make them when you want to make them.

Mr. Isserman: No, that isn't so, your Honor. We ask for a reasonable time in which to make them.

The Court: And what did I say?

Mr. Isserman: And I wish to note that the papers that we have prepared on which our motions are based are not in the courtroom at this time. We say that it is a denial of due process of law.

The Court: Well, you still have your head on your shoulders. Generally you speak at some length with fluency and without difficulty. You can make the motions orally. That is what is usually done.

Mr. Isserman: I wish to say that it is a denial of due process to compel us to proceed with motions at this time. In this kind of a case and under all the circumstances of the case we ask your Honor to consider that a short adjournment would be in the interests of justice and would cause no inconvenience or difficulty or hindrance of justice in any way whatsoever on an issue of this kind, and I have been in cases which have had some part of the magnitude of this case, and it has not been unusual for the Court in its sound discretion and considering the

—Tr. Tr. 6039—

needs of the defense to allow a short period of time for the preparation of motions. This is especially true when there are a multiple number of defendants, with complicated issues of law and fact and a number of trial counsel, and I ask this Court in the interests of justice and due process to reconsider the Court's decision and to grant us a short adjournment so that we may adequately prepare the presentation that we feel necessary to make.

The Court: I am wholly at a loss to see what argument you can have to indicate to me that the Government has not made out a prima facie case. The evidence that has been produced has been of such a character that it seems to me there is very little room for discussion on the point. How I could fail to submit this case to the jury on this evidence I

don't see; but if you are going to make any motions you better get busy.

Mr. McGohey: If your Honor please, I desire to ask that the record show that the Government rested at 3.15; that there was then a request for a recess by counsel for the defense; that the Court reconvened at 3.35 for the hearing of the motions as the Court had directed.

The Court: Yes.

Mr. Sacher: Does Mr. McGohey care to indicate

—Tr. Tr. 6040—

that it is now approximately 3.50 also?

Mr. McGohey: I shall be glad to do that if it will be understood that from the time we reconvened until now has been taken up by arguments for adjournment rather than the motion to dismiss.

The Court: Yes, that is right.

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—Tr. Tr. 6047—

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Defendant Dennis: I must say, the first thing that must be noted in respect to directing counsel to conclude any arguments or proffer any motions by 4.30 this afternoon makes a mockery of justice, because, by this ruling and by the injunction that defense must produce its first witness by tomorrow morning, your Honor has stated, in effect, that irrespective of what motions we offer that you cannot be convinced that there is no prima facie case.

The Court: Let me ask you a question—

Defendant Dennis: And, moreover, that you have prejudged this case.

The Court: Let me ask you a question: Do you conceive it possible that the proof in support of a given charge might be so clear that argument of its legal insufficiency might not be helpful? Does that

—Tr. Tr. 6048—

strike you as possible as a theoretical concept?

Defendant Dennis: I would—

The Court: Or would you like me to illustrate?

Defendant Dennis: I would prefer to conclude with the brief remarks which I have and then to comment—

The Court: I would like to put the thought in your mind and, you see—

Defendant Dennis: —on the question—

The Court: You see, you charge this with being a mockery of justice, and I understand that, of course, you are not familiar with these legal matters, that things strike you in a way that they might not strike experienced people.

Now, let us suppose, for example, that a man was charged with murder in the first degree, and there was proof that the defendant had a grudge against the man who was killed, and that he went to a store and bought a revolver and bought some ammunition; and then he went and hid in this man's house and, as the man came home, he shot him. And then, when those proofs come out at the trial, the lawyer for the defendant says, "Now, I want to have a week to prepare arguments here. I don't want to make any motions now because I am not ready now."

Are you prepared to admit that in that case the Judge would be justified in saying, "Now, go ahead

—Tr. Tr. 6049—

and make your motion right away and I will pass on it"?

Defendant Dennis: As your Honor well understands, there is no analogy between that hypothetical case that you referred to and this case, this concrete case.

The Court: You are here as a lawyer, Mr. Dennis.

Defendant Dennis: Yes.

The Court: By your own choice.

Defendant Dennis: Yes. I would like to present my point of view here.

The Court: When you begin talking about a mockery of justice and all that, you know, you cannot expect me to sit here like a bump on a log and hear you call me names without saying anything. I don't like to do that.

You go ahead now and call me some more names.

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—Tr. Tr. 6054—

. . . . . .

Mr. Crockett: —I assume perhaps correctly that it would be to no avail to ask the Court to grant a reasonable time to prepare—

The Court: It would be without avail to ask me to give any time for the making of these motions. They are to be made this afternoon.

Mr. Crockett: That is why I made the assumption.

Colloquy

The Court: Well, you put that word "reasonable" in there. I don't the request for any time now is reasonable. That is why I denied the application.

Mr. Crockett: I think, your Honor, that the defendants, as well as myself and other counsel began this trial with certain illusions that have been shattered because of the prejudicial actions of the Court.

The Court: But you challenged me before we even started, so you had no illusions.

Mr. Crockett: That is true, but once 12 Americans sat in that box I thought we would get something approximating a fair trial in this court.

The Court: Now, Mr. Crockett, you seem on the

—Tr. Tr. 6055—

brink of making trouble for yourself. Not now but later.

Mr. Crockett: May I complete my statement?

The Court: Yes, but I think you had better be as temperate as you can under the circumstances.

Mr. Crockett: I suggest that this latest ruling of the Court merely confirms all of the prejudicial rulings that have been made in the course of this trial. I suggest that during the course of this trial it has actually been possible and I have heard spectators making the Court's rulings before the Court himself made the ruling.

The Court: It is very interesting.

Mr. Crockett: Because the Court's bias was so obvious that it was possible—

The Court: That is an insulting comment you are making, Mr. Crockett, a very insulting comment.

Mr. Crockett: I have no desire to insult the Court.

The Court: I think you do. I think you do have.

Mr. Crockett: What I as a member of the bar have observed transpiring here in a United States Federal District Court—

The Court: I have said and I repeat nothing you men can do can goad me into doing something that

—Tr. Tr. 6056—

will lead to the breaking up of this trial. I expect not only what you are doing now but worse things to happen in the weeks to come, but I hope that we will get past them without undue difficulty, but I think I know just what you are up to now, so I think you better try not to make it any more virulent than you feel you have to with your present temper.

Mr. Crockett: There is no intention to goad the Court. I think, however, that the Court is mindful of the fact that prior to this trial we requested a bill of particulars that would enable us to prepare our defense. Because of the denial of that bill of particulars it was impossible for us to complete the preparation of our defense before the Government began putting on its testimony. As a result it was necessary for two and sometimes three of the counsel for the defense to stay away from court in order to prepare the defense.

The Court: Is that what you have been doing?

Mr. Crockett: During this entire week I have been out working on the defense of this case. I have also been trying to go through this multitude of exhibits and immaterial and irrelevant evidence that was offered by the Government that have been admitted trying to find out what the case was all about,

Colloquy

—Tr. Tr. 6057—

The record has gone to over 6000 pages and there are more than 300 exhibits, and in the face of that type of record we are expected in one and a half hours to make separate motions on behalf of these defendants.

The Court: I think the proof is very clear. The reason I think that I don't believe that more time should be allowed is that the proof that has been adduced is of such a character that I am at a loss to know what you can possibly argue as a ground for claiming that the Government has not made out a prima facie case. The matters of constitutionality of the statute have already been argued. True they may be reargued when the case is closed and all the evidence is in and the question is reconsidered in view of all that proof. The matter of a bill of particulars was argued before Judge Hulbert and argued before me and reargued again. Now the only question of substance I see is whether the Government has made out a prima facie case, and frankly, as I have said before here, the evidence is of such a character that I am at a loss to see what you lawyers for the defense can argue in support of a motion for dismissal or for acquittal as a matter of law. But you do not choose apparently to get down to that, but prefer to talk about other matters. Now that is your concern.

—Tr. Tr. 6058—

Mr. Crockett: Now the statement which the Court has just made I submit is characteristic of the manner in which you have conducted this trial.

The Court: I have listened to you—

Mr. Crockett: But, your Honor—

The Court: Don't try to shout me down.

Defendant Winter: May I inquire whether your Honor's threats against my attorney are intended to deprive me of counsel in this trial? That is the effect it has.

The Court: I will make no further comment, Mr. Winter.

Defendant Winter: It seems that is what the Court is up to. My attorney is seeking to speak as is his right. The Court is threatening—

The Court: The Court is not threatening him at all. However, I think the best thing for me to do is to have a five-minute recess, as I did before, when this started.

. . . . . .

—Tr. Tr. 6219—

New York, May 23, 1949

. . . . . .

The Court: Is this International Labor Defense something that is a matter more or less of common knowledge, or is this going to introduce a controversial feature here. I do not want to multiply issues and have the trial go on forever.

Mr. Sacher: That isn't—

The Court: I just do not happen to know what this International Labor Defense is. It may be something that will turn out to prolong the trial unnecessarily.

Mr. Sacher: Why, your Honor, I have been with this witness for less than 50 minutes and we are talking about prolonging the trial.

The Court: Yes.

Mr. Sacher: I am directing these questions for one purpose and one purpose only, and that is to—

—Tr. Tr. 6220—

The Court: Do you know what I asked you?

Mr. Sacher: Yes.

The Court: Or have you forgotten?

Mr. Sacher: Yes, I know what your Honor asked me.

The Court: You don't seem to be responsive.

Mr. Sacher: I know, but to be interrupted with a statement when I have had the witness on the stand for 50 minutes, to talk about prolonging the trial—

The Court: Now don't start that, Mr. Sacher, because it is just disagreeable here for everybody. It doesn't help you or your client much. Now please don't do that.

Mr. Sacher: Very well, your Honor.

The Court: You know, you have to have some minimum respect for the Court.

Mr. Sacher: Well, I do have respect for the Court; of course, I do.

The Court: Well, you wouldn't speak that way if you did.

Mr. Sacher: Now if the Court please, the purpose of introducing this evidence in regard to the International Labor Defense is—

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—Tr. Tr. 6269—

New York, May 24, 1949

* * * * *

Q. Will you please tell us of the circumstances in which you were arrested? A. There was a mass meeting in front of the County Court House in Warren, Ohio, during the first week of March 1933. I know it was the day before President Roosevelt made his first inaugural address; that is how I recall it. I was the scheduled speaker at that meeting. The purpose of the meeting was to bring about an increase in the relief rates in the County, and also to ask for unemployment and social insurance. I began to speak and I said—

Mr. McGohey: I object to the speech, your Honor.

The Court: Sustained.

A. I never was able to make the speech.

The Court: Then it will be easy to omit it.

Mr. Gladstein: If your Honor please, the fact

—Tr. Tr. 6270—

that the witness wasn't permitted to make the speech some years ago is no reason why he shouldn't at least be permitted to state the circumstances.

The Court: I have ruled out the speech. He says there was no speech, so there is nothing left to discuss.

Q. Will you please describe what happened at that time, Mr. Gates? A. I uttered one word and then two policemen—one clapped his hand over my mouth and the other

grabbed me and they took me through the courthouse, out through the other end and into the County jail across the street.

Q. Was any charge placed against you? A. Yes, there was an ancient ordinance they dug up which stated that I was accused of making a loud noise without a permit.

Q. Did you defend yourself on that charge? A. I did.

Q. Were you represented by counsel? A. I was but I chose to defend myself at the trial.

Q. What was that? A. I put up a terrific defense but the judge ruled against me. I was sentenced to $25 and costs or 30 days in jail.

Q. And what did you do in connection with that judgment? A. I appealed the case.

Q. I take it that on this occasion you engaged a lawyer? A. I did not hear you.

Q. I say, that on the appeal you engaged a lawyer?

—Tr. Tr. 6271—

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you engage a lawyer—

Mr. McGohey: Objection.
The Court: Sustained.

Q. —on the appeal?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Were you ever called upon after you appealed to pay the fine or serve a sentence?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: Just a moment, your Honor. May—

The Court: I don't want any argument, Mr. Sacher.

Mr. Sacher: Can't we have the facts?

The Court: You are not going to get this fact. I have sustained the objection to it. I don't want any discussion.

Mr. Gladstein: May I interrupt, your Honor, to object to the Court's ruling that prevents the establishment by testimony of the ultimate outcome of this matter, and I submit that a strange contrast is afforded by the Court's insistence, for example, to which we have no objection—but the Court's over-insistence on pursuing to its final conclusion

—Tr. Tr. 6272—

the arrest and conviction of the witness Nicodemus, concerning which it would seem to me—

The Court: You will please desist from further argument, Mr. Gladstein.

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—Tr. Tr. 6285—

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Q. Mr. Gates, you have used a few terms in your statement which it may perhaps require some elucidation. You referred to private ownership of means of production under what you called capitalism and the socialist or public ownership of the means of production under what you call socialism. Would you be good enough to tell the jury what is meant by the term "means of production"?

The Court: That is, what it meant to him?

Mr. Sacher: Yes, what it meant to him.

A. Means of production were the factories, the mines and the mills.

Q. And is that the commonly understood meaning of the term "means of production" in economics generally? A. Yes.

Mr. McGohey: I object.

—Tr. Tr. 6286—

The Court: I sustain the objection.

Mr. Sacher: It is—

The Court: Strike the answer.

Mr. Sacher: —on the ground the witness is not qualified, your Honor? Because you will recall, your Honor—

The Court: I have sustained the objection, Mr. Sacher.

Mr. Sacher: May I not know why so I may correct it if it is correctible?

The Court: I have no comment to make.

Mr. Sacher: You helped Mr. Gordon one day and I would like a little help too.

The Court: Mr. Sacher, you will please desist from this sort of thing.

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—Tr. Tr. 6418—

New York, May 25, 1949

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Q. Did the Communist Party during the period covered by the indictment ever teach that there is any fascism in the United States at all?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did the Communist Party—

The Court: I will allow that. I will change that ruling. I will allow that question.

Mr. McGohey: Well, the point was, your Honor, that it was repetitious.

Mr. Sacher: Well, I am just leading up to something.

The Court: Well, I will allow it.

A. The Government of the United States is not—

The Court: No; listen to the question.

—Tr. Tr. 6419—

Q. Did the Communist Party during the period covered by the indictment teach that there was any fascist, any fascist government in the United States—

The Court: No; read the question.

Q. —or any fascism in the United States?

The Court: No. Let us not change it around. Read the question, Mr. Reporter.

(Question read as follows: "Did the Communist Party during the period covered by the indictment ever teach that there is any fascism in the United States at all?")

The Witness: That is what I was proceeding to answer.

The Court: Well, you can say yes, or you can say no.

The Witness: I can't give that kind of an answer.

The Court: Very well; then ask the next question. He cannot say whether they ever did or not without an explanation.

Mr. Gladstein: No, your Honor. He said he cannot answer yes or no to that question.

The Court: That's what I said.

Mr. Gladstein: That is a lot different than what your Honor said. If your Honor will give him an opportunity to—

—Tr. Tr. 6420—

The Court: Do stop that deliberate tone, Mr. Gladstein. It is—

Mr. Gladstein: I assign that—

The Court: I said the very same thing that the witness said. He couldn't say yes and he couldn't say no without an explanation. There is no difference between the way you put it and the way I put it.

Mr. Gladstein: I assign your Honor's remarks as—

The Court: You can assign it any way you want to.

Mr. Gladstein: I assign that remark.

The Court: Fine. Sit down and stop now.

Mr. Gladstein: And in sitting down I assign that last remark.

The Court: That's fine, fine.

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—Tr. Tr. 6459—

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Q. And did you intend to express in that article your views of American democracy at that time?

Mr. McGohey: Objection, your Honor.

The Court: Sustained.

Mr. Sacher: I offer the article in evidence (hand-

—Tr. Tr. 6460—

ing to Mr. McGohey).

Mr. McGohey: 19 to 21, you said?

Mr. Sacher: Yes.

Mr. McGohey: This is objected to, your Honor (handing to the Court).

The Court: Sustained.

Mr. Gladstein: Your Honor, may I ask that the Government be required to state the grounds for its objection to a document that this man wrote twelve years ago before he ever knew that there would be an indictment and when he expressed his political views on the very issues involved in this case? May I know what the legal ground is by which a man is prevented from showing his intentions, his state of mind—

Gates—Direct
Colloquy

The Court: You remember my instruction about these arguments?

Mr. Gladstein: I desire to ask the Court to require the Government to explode this mystery whereby with the mere words "I object" they can shut off the right of a man to show—

The Court: You may think that this matter of argument is helpful. It is certainly not helpful to me. Now you have requested, and you could have requested without those comments and that argument that the Government be required to state the

—Tr. Tr. 6461—

grounds of its objection. That application is denied.

Mr. Gladstein: Your Honor, we have been sitting here for months—

The Court: Now please don't start this argument over again.

Mr. Gladstein: May I—

The Court: I have no desire to hear it. If you have some motion, make it. If you have some objection, state it and I will rule on it.

Mr. Gladstein: Well, I do object to a ruling which prevents a man from summoning to his defense the deeds and the acts of his life committed long before there was any question about it—

The Court: I do not really think, Mr. Gladstein, you have any right to proceed with that form of argumentative matter when I have forbidden it. Now you have already got a very substantial record of disobedience here. You may have an additional record now if you choose to go on.

Mr. Gladstein: I have no desire to disobey the Court's admonitions.

The Court: But you have.

Mr. Gladstein: I do have a desire, your Honor, to bring before the jury the opening pages of the book—

The Court: Well, I think, Mr. Gladstein, this sort of argument is the very sort of thing that you are

—Tr. Tr. 6462—

not entitled to bring before the jury, and I forbid it.

Now as I said before, if you choose to pile up the record of these things against yourself, you may go on.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: Otherwise you will sit down.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: Very well.

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—Tr. Tr. 6530—

New York, May 26, 1949

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Q. Now, Mr. Gates, I direct your attention to the next to the last sentence in the righthand column on page 997, which reads as follows:

"Victory over Nazism can no longer be achieved as easily and cheaply and with such comparatively little sacrifice as it could have been when the fate of Spain and Czechoslovakia were at stake."

And I ask you what meaning those words had for you and the other members of the Communist Party at the date of the publication of this article?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: I don't see the difference, if I may say so, between—

The Court: I don't want to argue, Mr. Sacher. Please don't get that started again.

Q. I read you the next sentence on page 997, which is right at the bottom of the page:

"The Nazis, aided by the Municheers—M-u-n-i-c-h-e-e-r-s—have become the most menacing machine bent on world conquest the world has ever seen."

And I ask you what the expression "Munichеers" in that sentence meant to you and the other members of the Com-

—Tr. Tr. 6531—

munist Party at the time of the publication of this article?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: Well, is it on the theory that everybody knows who "Munichеers" are, your Honor? I submit that this is important on the question of intent.

The Court: Mr. Sacher, I don't desire argument. If your question is right, then you are right and I am wrong. Now, I have to decide here, and I have

sustained the objection. I don't want argument over every question the way you seem disposed to do.

Mr. Gladstein: Your Honor, may I ask the Court to inquire of Mr. McGohey what legal grounds, if any, he urges in support of his objection to this question?

The Court: You have in effect asked me to do that and I refuse to do so.

Mr. Gladstein: Your Honor refuses?

The Court: I do.

By Mr. Sacher:

Q. Mr. Gates, I invite your attention to the next sentence after this one, which referred to the Munichеers, which reads as follows:

"Past sins must be paid for now."

And I ask you what meaning those words had to you —Tr. Tr. 6532— and other members of the Communist Party at the time of the publication of your article?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: I don't think there is a soul in this courtroom who knows what the words "Past sins must be paid for now" mean unless this witness is permitted to say what he was talking about.

The Court: Now—

Mr. Sacher: And what is the use of laying it before the jury?

The Court: —you realize that your action now is deliberately contemptuous?

Mr. Sacher: It is not deliberately contemptuous, I am just bewildered, your Honor.

The Court: I have told you not to argue these matters, and I really am quite at a loss to understand why you so flagrantly and deliberately and persistently disobey my instruction. Probably it is because I don't shout at you but I don't like to do that.

—Tr. Tr. 6570—

Q. Mr. Gates, I show you Defendants' Exhibit QQQQQ for identification, and ask you whether you were one of the

—Tr. Tr. 6571—

authors of that document (handing)? A. Yes, I was.

Q. When and where was it written? A. It was written in Spain on the occasion of the July 4th Anniversary, 1938.

Q. When you say the July 4th Anniversary, what anniversary do you mean? A. The American July 4th Anniversary.

Q. The anniversary of American Independence? A. Yes.

Mr. Sacher: I offer QQQQQ in evidence (handing).

Mr. McGohey: This is objected to, your Honor (handing to Court).

The Court: Objection sustained.

Mr. Sacher: If it is on the question of relevancy, your Honor, that is one thing, but if it is a question of foundation—

The Court: No, I am not going to get into the war in Spain.

Mr. Sacher: I take it then that it is not on the question of laying a technical foundation of competency, so that I won't waste time trying to lay that sort of a foundation.

The Court: I can't imagine that that document would be admissible.

Mr. Gladstein: Your Honor, may I ask the ques-

—Tr. Tr. 6572—

tion? Because I will have occasion to—

The Court: Well, you generally ask them; go ahead.

Mr. Gladstein: Thank you. I will have occasion to produce witnesses and defendants who will testify as part of the testimony that I desire to bring before the jury, so that the jury can judge the intent—

The Court: Well, you see, you like to make these little arguments and I suppose I might just as well relax and let you go ahead. You have done so repeatedly. Now I think I understand what you desire to argue.

Mr. Gladstein: Then let me go ahead since your Honor says you will.

The Court: Well,—

Mr. Gladstein: One of the things I want to know is this: I have always operated on the theory that a man's past state of mind and intention is best

illustrated by the things that he did and said and wrote and printed, and his conduct in the past, so that when you accuse him of a certain thing in the year 1949, let us say, the best way of telling exactly what the truth was is to go back and find out what he did before, what he said and what he thought and expressed on the subject at hand.

The Court: The subject at hand.

Mr. Gladstein: Yes, your Honor. Now it so

—Tr. Tr. 6573—

happens that one of the issues in this case is the question of the intention of each and every defendant—the question whether any of the defendants intended to say or print or do anything that advocated the overthrow of the Government of the United States by force and violence.

The Court: We will not go into the war in Spain.

Mr. Gladstein: But my point is this: it is no longer any secret that we are dealing here with a question of ideas, and surely the best evidence of a man's understanding of ideas, be it philosophy, science, economics, or whatever it may be, is to be found in his application of those ideas, in his expression of those ideas.

The Court: Now Mr. Gladstein, you know you have heard me say many times that I have the problem here of drawing the line. It is obvious that if I permit these defendants to bring in everything they ever said, everything they ever wrote, all their conduct in all the matters having to do with anti-Semitism, arguing matters for the Negroes, being in support of the Republican government in

Spain, being opposed to Chiang Kai Chek, and the Chinese government, and so on, we will be here for an indefinite period, and I have felt that I was drawing the line at the proper place. Now one of those places is that the war in Spain is out.

—Tr. Tr. 6574—

Mr. Gladstein: Your Honor, I agree that all of the things that the defendants did and said to fight anti-Semitism and Jim-Crowism and other evils could not possibly be brought before this Court because it would take years.

The Court: And we might get our attention diverted from the real issue.

Mr. Gladstein: No, no, it would certainly take years to produce the proof of what these men did fighting these things.

The Court: You see, you always try to get a little argument in. I suppose there is no use of my trying to stop you because you go right on just the same. I don't recall believe that it is going to do you any good.

Mr. Gladstein: Let me say this: I believe a certain substantial amount of evidence should be permitted, not unlimited, to show the conduct and expressions of these men on certain basic issues in the past, and that is why I said it wouldn't be possible in a trial to allow each defendant to produce all of the things and statements for which he is responsible and for which he is entitled to credit on many of the things he has devoted his life to. In fact, we couldn't and wouldn't because

not only would it be a wonderful and honorable thing to do but it would be—

—Tr. Tr. 6575—

The Court: You keep praising them.

Mr. Gladstein: However, the point I make is this: You say you wish to impose a limitation of degree, which is all right.

The Court: I say I am doing it.

Mr. Gladstein: But I want to point out that you are imposing a restriction of subject, not of degree. You are not only not permitting a certain amount of testimony on a certain subject and saying, "Well, that is reasonable, that is enough;" in fact, your ruling shuts off the possibility of any proof whatsoever on one of the most important aspects of the lives of these men and of the party which they worked with and worked for and represented, and therefore I submit—

The Court: Now Mr. Gladstein, I really wish you wouldn't argue any more. You know, when I speak mildly as I do you gentlemen go right ahead and don't pay any attention to me. I don't like shouting at people and wrangling. I don't think it makes a person effective to do that. Why don't you let it go at that? I understand what I am doing here. If I am wrong the law provides the remedy, but I am doing it very definitely and decisively. You say no evidence was allowed. What have we been doing here for the last few days? Reading paper after paper after paper of his own documentation showing what he thought and what he

—Tr. Tr. 6575-A—

was doing and all that. I try to be liberal about it, but I see difficulties ahead in going into the war in Spain. I want to avoid the multiplicity of issues and confusion of the issues. I can see no profit to anyone in that, and so I am going to rule it out.

—Tr. Tr. 6576—

Mr. Sacher: I should, with the Court's permission—

The Court: Excuse me just a second here.

(A pause.)

Mr. Sacher: I should just like, with the—

The Court: Mr. Thompson?

Defendant Thompson: I am very vitally interested in this question of Spain and might I—

The Court: Do you think it's wise, when you've got a lawyer representing you here, to rise this way to address the Court?

Defendant Thompson: Well, I would just like to point out to your Honor that it is not a question of the activities of our Party or of one or two defendants that are involved when you rule out the question of Spain. The experience of Spain has very profoundly influenced the position of our Party towards many questions, the problem of the state and many other questions, that are vital and essential in any presentation of the development of the line of policies of our Party, and that is what you are ruling out when you say you are ruling out the question of Spain.

The Court: I don't intentionally circumscribe the defendants' proof. It seems to me that there should be ample opportunity for them to show that their intention was an intention for peaceful reform and

—Tr. Tr. 6577—

change by legal means without having to go into the proceedings in Spain and all the literature that they may have issued about that. Now, I may be wrong about that, but that is the best determination I can make of the subject.

So, let us get on.

Defendant Dennis: Might I address the Court?

The Court: Yes, Mr. Dennis.

Defendant Dennis: Very briefly. In addition to the arguments I made on this question yesterday, I would like to call to the attention of the Court that this proffer of evidence, as well as the issues which we are bringing forward in connection with Spain, concern themselves very directly with our understanding of and application of the principles of Marxism-Leninism, not only in general but on the question that has been raised in the indictment in respect to force and violence. And the matters that we wish to bring before the attention of the jury and the Court would demonstrate most clearly who advocates and promotes force and violence, and our position in this respect in our defense of democratic liberties including a democratic republic and I would urge the Court to reconsider its ruling on this question, which is not a technical matter.

Defendant Davis: Also, your Honor, I would like to say something.

—Tr. Tr. 6578—

The Court: Just a moment. Just a moment, if you please, Mr. Davis.

(A pause.)

The Court: Yes, what have you to say?

Defendant Davis: Apparently—

The Court: Before you say very much I want to make a little observation. You know, you gentlemen have been bobbing up here, saying things and doing things that I did not consider were very proper to do, some of them rather—well, I won't characterize them because we all remember what you and your other defendants have said and done. This is the first time you have got up. Now, I have determined here that I am going to have an orderly trial. I don't think in the early stages that any of you gentlemen really thought I meant what I said or that I would succeed.

Mr. Gladstein: That is objected to.

The Court: That's all right. But it appears that I have succeeded rather well, and that the proceedings are becoming more regular and orderly every day.

I have penalties at my disposal, if the defendants insist upon interrupting the proceedings and holding forth, although they have lawyers to represent them, and I dislike very much doing some of the things that the law places it in my power to do.

—Tr. Tr. 6579—

Now, I just want you to remember that. I believe that the best way to go ahead here is for the defen-

dants to just sit there and let your lawyers represent you instead of jumping up every once in a while to get your own comments in, and your own views, and I tell you, for your own good, that I recommend that.

Defendant Davis: It is pretty hard for the defendants to sit here like a bump on a log, as you say, while a whole lot of rulings are made which are practically cutting the guts out of what our Party stands for. This Court claims—

The Court: I consider that an extremely offensive statement.

Defendant Davis: Well, the whole trial is offensive to me and should have been thrown out a long time ago.

The Court: No defendant gets very much pleasure out of a criminal trial.

Defendant Davis: Of course, and I don't see what pleasure the Government should get in bringing this ridiculous and stupid trial in the first place.

The Court: Now, Mr. Davis, do you realize that you may be forcing me to remand you during the remainder of the trial?

Defendant Davis: Well, I cannot help that. All

—Tr. Tr. 6580—

I want to do is to say the truth, that is all.

The Court: Oh, you can help it. You can help it.

Defendant Davis: And if you wanted the truth you would let our Party say what it teaches and advocates, in Spain and elsewhere.

The Court: If you maintain yourself in an orderly way, you will avoid that. If you insist upon

being disorderly, I shall remand you for the remainder of the trial.

Let's get on.

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—Tr. Tr. 6838—

New York, June 2, 1949

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The Court: You know, Mr. Gladstein, that I have indicated my desire not to hear arguments unless I desire them.

Mr. Gladstein: I do, your Honor, but I thought that that was limited simply to hearing argument. Now it seems to me, and I submit, that the Court is now making it plain that it no longer wishes to hear evidence from the defendants, and that began to be true when the defense began to put in its case.

The Court: Mr. Gladstein, we have been getting along very nicely here the last day or two with that atmosphere of calm that I think is suitable for a

—Tr. Tr. 6839—

trial of any issues and even more so for the trial of the issues here, but you seem disposed to start the same old business up again. I wish you wouldn't do it.

Mr. Gladstein: I suppose your Honor's remark had to do with the fact that I was absent the last two days.

The Court: No, I thought you made some comments that seemed to me rather offensive and unnecessary.

Mr. Gladstein: I assign as misconduct your Honor's remarks.

The Court: Well, you may.

Mr. Gladstein: Particularly, your Honor just said something about "the same old business." I assign that remark as misconduct and ask your Honor to advise the Jury to disregard it.

The Court: Both of your motions are denied.

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—Tr. Tr. 6843—

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Q. Mr. Gates, you are familiar with the pages 160 to 172 of Exhibit 30, are you not? A. I am.

Q. Now I ask you what, during the period covered by the indictment, was your understanding of the expression "converting the imperialist war into a civil war" which appears at page 167 of the History of the Communist Party of the Soviet Union, which is Government's Exhibit 30?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: That has not been covered by this witness as to this inquiry. It is absolutely new. It does not constitute any repetition whatsoever. I

—Tr. Tr. 6844—

went through the record and I make that representation to the Court.

The Court: Go ahead. Go ahead.

Q. Mr. Gates, referring to this expression "converting the imperialist war into civil war," from your participation in the practices of the Communist Party, as you have

testified, and from your relationships with these defendants such as you have testified here and bearing in mind the other circumstances that you have described in your testimony, what did this expression "converting the imperialist war into civil war" mean to you during the period covered by the indictment?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: May I point out, your Honor, that I have used the exact words of a question that you yourself put to the witness Budenz?

Mr. Gladstein: If the Court doesn't desire to answer Mr. Sacher's question I would like to ask the Court a question. Is it to be the rule, your Honor, that the jury is to hear only from the Government witnesses as to what they understood documents or teachings to mean, or are the defendants to be allowed to give their state of mind, their beliefs and their intentions?

The Court: I think I see what you are up to. You

—Tr. Tr. 6845—

have had a good rest, and you are right back here because of that.

Mr. Gladstein: I assign those remarks as improper, unwarranted and misconduct.

The Court: That is all right.

Mr. Gladstein: And I ask the Court to please stick to the point that is a very vital point to the defense.

The Court: I don't intend to get into any discussion or argument with you at all, Mr. Gladstein.

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—Tr. Tr. 6884—

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Q. Paragraph 9 of the indictment reads:

"It was further a part of said conspiracy that said defendants would publish and circulate, and cause to be published and circulated, books, articles,

—Tr. Tr. 6885—

magazines, and newspapers advocating the principles of Marxism-Leninism."

I ask you whether you as editor in chief of the Daily Worker, or otherwise, have participated in the publication or circulation of books, articles, magazines or newspapers advocating the principles of Marxism-Leninism?

—Tr. Tr. 6885—

A. I have circulated the works of Marxism-Leninism, which do not advocate the overthrow of the United States Government by force and violence.

Mr. McGohey: That is clearly not answering the question, your Honor.

The Court: Yes, but I will let it stand for what it is worth.

Mr. Gladstein: Just one moment. I ask that the last portion of the Court's remark be stricken and that the jury be admonished to disregard the statement "for what it is worth."

Now your Honor made a statement yesterday that I also want to assign as judicial misconduct. It appears at page 6744. Mr. Gates was testifying and your Honor said, "Maybe that is the catch in it."

And then when the witness turned to you—I can imagine the feeling that he had—and he said, "The catch in what, sir?"—your Honor said, "As to how you figured that out."

—Tr. Tr. 6886—

I assign that as prejudicial misconduct and I ask your Honor to instruct the jury to disregard that statement by the Court and also the present statement in which your Honor belittles the testimony by saying you allow it to remain in for what it is worth.

The Court: I see you came back after a long rest determined to be provocative.

Mr. Gladstein: I had no rest. I was working on this case.

The Court: You can be just as provocative, you can be just as unruly as you choose. You know, you have tried it so often and found that it is unavailing. Now go ahead and do as you like.

Mr. Gladstein: All I ask the Court to do, if the witness's answer is correct and legally belongs in the case, is to overrule the objection. If the witness's answer ought to be stricken, then by all means strike it. But don't say, for heaven's sake, that you let the testimony stand for what it is worth. That is the point of my objection.

The Court: You know, this "for heaven's sake," what is the use of bringing that in? I suppose it has to come in. I overrule the objection and deny the series of motions you have made.

—Tr. Tr. 6891—

Mr. Sacher: I offer Defendants' Exhibit 6 x E for identification in evidence (handing to Mr. McGohey).

(Mr. McGohey examines exhibit.)

Mr. Sacher: May it please the Court, I have another exhibit of a similar sort that I was going to offer, and it occurs to me—

The Court: Are they answers by Foster?

Mr. Sacher: No, the others are by Mr. Dennis.

The Court: What is that?

Mr. Sacher: The others are by Mr. Dennis that I intend to offer, and it just occurred to me that rather than have everyone sit around and wait while the prosecution is examining them I could have the others marked for identification and later lay the foundation for them and give the prosecution a chance.

The Court: I think that may be done.

Do you have any objection, Mr. McGohey?

Mr. McGohey: No, but I do not think it is necessary to do that while we sit around because I am prepared now to object to this (handing to Court)—and I do object.

The Court: I directed the taking of the deposition of answers by Mr. Foster.

Mr. Sacher: This has nothing to do with this. This was published in January 1948, your Honor.

—Tr. Tr. 6892—

The Court: Well, I will sustain the objection.

Mr. Gladstein: Let the record show that that was done without even examining the contents.

The Court: You can make any statement you care to, Mr. Gladstein. I find that refraining from argument with you leaves me more peace of mind.

Mr. Sacher: Now if it please the Court, I should like to make separate offers of some of these questions that we believe to be relevant and pertinent.

The Court: Well, they may be considered as offered sentence by sentence and word for word, and if objected to I will sustain the objection.

Mr. McGohey: The Government states that it will object to each and every sentence, each and every word, each and every question and each and every answer contained in the exhibit marked 6 x E for identification.

The Court: Very well. I will rule as indicated, so you need not make the separate offer by paragraphs.

* * * * *

—Tr. Tr. 6906—

Cross Examination by Mr. McGohey:

Q. Mr. Gates, I think you testified yesterday, or during your testimony yesterday, that you had studied about the reorganization of the Communist Party of the United States while you were in the Army? A. No, I said when I returned from the Army I had made a study of it. That is what I testified yesterday.

Mr. Gordon: What is the page?

Mr. McGohey: 6381, I think it is—6831.

Q. Mr. Gates, reading from the transcript—

Mr. McGohey: At page 6831, Mr. Sacher.

Q. —there appears the following:

"The Court: Did you understand that as soon as you heard about this reconstitution of the Party or is this something recent?

"The Witness: I am stating I understood this as a result of all the study I did all the time I had been away in the Army."

Did you make that answer, Mr. Gates? A. If it says that, I must have said it,—

Q. Now, Mr. Gates,— A. —but I don't recall it in that way.

Mr. Sacher: Just a moment, just a moment. I submit the witness has a right to explain what he said.

The Court: Let him go ahead and explain it.

—Tr. Tr. 6907—

Mr. Sacher: O.K.

Mr. McGohey: That is right.

The Court: What is the explanation?

Mr. McGohey: I was just going to help him by reading what follows, but maybe, if the witness doesn't desire—

The Court: Maybe he would like to explain first before he knows what he has to explain.

Mr. Gladstein: There is no occasion to argue the question back and forth.

The Court: Thank you for helping me. You always seem so eager to tell me just what to do. I appreciate that.

Gates—Cross
Colloquy

Mr. Gladstein: I am delighted your Honor is appreciative of it because—

The Court: Yes.

Mr. Gladstein: —all I try to do is to suggest the principles of law when I rise.

The Court: What principle of law is applicable here?

Mr. Gladstein: Well, there was one this morning which your Honor recognized, in fact conceded acknowledgment of the fact that it was elementary. This one is simply this: the witness has a right, if he wants to, to explain an answer, but he isn't asked

—Tr. Tr. 6908—

for that and there is no occasion for the Court to suggest by way of colloquy with the U. S. Attorney anything by way of innuendo. That is what I am objecting to in the last remark.

The Court: There is an innuendo there?

Mr. Gladstein: Yes, and it isn't the first time.

The Court: And just what is the innuendo?

Mr. Gladstein: And it isn't the first time.

The Court: You are positively insulting, Mr. Gladstein, but I see that you do it in a way that is calculated, and I suppose I had better overlook it, but I must say I should think you would give it up,—

Mr. Gladstein: I deny it—

The Court: —because it isn't working.

Mr. Gladstein: I deny the statement of the Court. I object to the remarks.

* * * * *

—Tr. Tr. 6914—

Q. You say when you came back you visited the headquarters of the Communist Party here in New York City and were then for the first time officially informed that you had been elected to the Committee? A. That is correct.

Q. Who was it that gave you this official information? A. Mr. Eugene Dennis.

Q. Do you know what position he occupied in the Party at that time?

Mr. Sacher: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Gladstein: Your Honor, may I suggest that this happens to be the question, if I heard it correctly, that your Honor has had occasion to castigate a couple of times in the course of this case. I think you said that was the stupidest type of question and very unfair to the witness that was here.

The Court: I don't know what I am going to do with you, Mr. Gladstein. It is a problem.

—Tr. Tr. 6915—

Mr. Gladstein: It is just the form of question your Honor said that—

The Court: I suppose—

Mr. Gladstein: I am willing to show you places in the record—

The Court: I suppose—

Mr. Gladstein: —where you have said that kind of question ought not to be asked.

The Court: Well, I suppose—

Mr. Gladstein: I will submit a brief.

The Court: —I have to endure these little interruptions every once in a while.

To get our minds on what the question was, will you read the question?

Mr. Gladstein: I object to those remarks and assign them as improper.

The Court: Very well.

(Question read, as follows:)

"Q. Do you know what position he occupied in the Party at that time?"

The Court: That is Eugene Dennis?

(The reporter read preceding question and answer.)

A. I do.

Q. Will you tell us what it was? A. I am ready to tell

—Tr. Tr. 6916—

you what I was at that time.

Mr. McGohey: If the Court please—

The Court: Wait a minute. Let us see what he has to say. I am a little puzzled at this.

A. (Continuing) But I don't want to testify here as to what my fellow comrades were who are on trial here. It is a matter of public knowledge as to what position Mr. Dennis occupied at that time. It has never been concealed. It has always been made public. It has been placed in evidence here as to what position Mr. Dennis occupied, but

I am not going to become a stool pigeon and finger my comrades in this case for the purposes of the prosecution.

The Court: Strike that answer out.

Now, answer the question.

—Tr. Tr. 6917—

Mr. Gladstein: I submit the question has been answered and I ask the Court at least to advise the witness that he has a right to insist on the answer that has been given.

The Court: Now let's see. Are you Mr. Gates' attorney? I thought Mr. Sacher was.

Mr. Sacher: Yes, your Honor, I am Mr. Gates' attorney. There is no reason for your Honor to be theatrical about it.

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—Tr. Tr. 6926—

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Mr. Crockett: In your remarks you have emphasized that in the ordinary case it is perfectly normal for a witness to be asked who was a certain individual. The thing I am trying to impress upon the Court is that this is not the ordinary case. If your Honor will be patient I think I can develop that in a few sentences, and I will do it this way:

The answer to that question not only identifies the position which Mr. Dennis may have held in the Communist Party, it also identifies Mr. Dennis as

—Tr. Tr. 6927—

a member of the Communist Party. So in effect what the prosecution is asking this witness to do

is to testify as to Mr. Dennis's membership in the Party. It might very well not be Mr. Dennis; it might very well be any other person as to whom the prosecution might ask whether he is a member of the Party and so on.

The Court: You mean to say that all the witnesses are going to refuse to answer those questions?

Mr. Crockett: I can't anticipate what witnesses will do when they get on the stand.

The Court: If this objection were sustained we just would have the defendants and the witnesses of the defendants testifying to what they chose to testify and refusing to testify to anything else just as you lawyers did in the early part of the proceedings. You refused to answer my questions.

Mr. Gladstein: That is objected to.

The Court: Object away. There is no jury present.

Mr. Gladstein: I assign that as judicial misconduct. I object very seriously and I assign it as prejudice and bias of the Court.

The Court: You did refuse to answer questions when I put them to you and your colleagues again and again. What is the use of making out you didn't do it?

. . . . . .

—Tr. Tr. 6946—

. . . . . .

Q. National Veterans Committee? A. Yes.

Q. Were there other members of that committee besides yourself? A. There were.

Q. And how many? A. Oh, it varied greatly from time to time. I cannot recall exactly now.

Q. At the time you assumed the directorship, how many were there? A. I should say somewhere between five and ten.

Q. Will you tell us who they were?

Mr. Sacher: I object to that, your Honor.

The Court: Overruled.

Mr. Gladstein: If your Honor please, may we be heard on this? If this has to do with the defendants, each and all of whom have stated that they volunteer to state for the record all the positions they have held during the period covered by the indictment, what they have been in the Communist Party, that is one thing. It certainly can have no place in this case at all for Mr. McGohey to seek to ascertain the names of other persons not here on trial because the very naming of those persons would possibly subject those persons to prosecution or persecution. I see no possible competency or relevancy to that question, your Honor.

The Court: I will hear from Mr. McGohey as to that.

—Tr. Fr. 6947—

Mr. Gladstein: Very well.

Mr. McGohey: If the Court please, this man is testifying and has testified that he was a member of the National Committee—certainly at this time about which I am inquiring now—and he says that he was the director of a committee of the Communist Party that had certain obligations or certain duties

to the Party with respect to its handling of veterans' affairs. I submit that I am entitled to question all of his activities in connection with that because he did whatever he did there as a member of the national staff of the Communist Party. One of the things I am entitled to inquire about is how many people worked with him, what he did, and what they did, and who they were.

Mr. Sacher: If it please the Court, I have—

The Court: Just a moment, Mr. Sacher.

Mr. McGohey: If for no other reason, your Honor—

The Court: Are these—

Mr. McGohey: —if for no other reason than on the issue of credibility.

The Court: Do these people on this Veterans Committee have anything to do with the maintenance of these schools that has been testified to, Mr. McGohey?

Mr. McGohey: I beg your pardon, sir?

—Tr. Tr. 6948—

The Court: Do these members of the Veterans Committee have anything to do with the teaching in these schools that we have been hearing about from the witnesses?

Mr. McGohey: Well, I don't know, your Honor, but I think I am entitled to inquire whether they did.

The Court: Of course, the defense in negating the, or claiming that they negated the claims of the prosecution have gone rather fully into this veterans matter, have they not?

Mr. McGohey: Yes, indeed.

Mr. Sacher: I would like to be heard before your Honor rules, if I may.

The Court: You know, Mr. Sacher, this argument business gets interminable in this case.

Mr. Sacher: I promise to be very brief.

The Court: It seems as though one never were to assume that the Judge has any knowledge of anything, and then we get into these arguments, and they seem so largely extra legal.

Mr. Sacher: I intend to confine myself—

The Court: I will hear you briefly on it. What is it you want to say?

Mr. Sacher: The point I wish to make is that we have no objection whatever to the fullest exploration of whatever Mr. Gates did from the time he was

—Tr. Tr. 6949—

born up to the present time.

The Court: But you don't want him to mention anybody else.

Mr. Sacher: No, the point is that, for the reasons that we have advanced, mentioned by Mr. Gladstein, we think that the request for him to identify other people is utterly irrelevant and can only result in possible injury to those people. If it doesn't further the matters to be established by the prosecution, then I respectfully submit that Mr. McGohey's reiteration, "I am entitled to have it," and suggesting that credibility is at issue as the basis of this inquiry, does not constitute a sufficient ground. Mr. Gates has testified for six or more days and I respectfully submit that if there is anything in his

testimony the credibility of which can be successfully assailed, I invite Mr. McGohey to do it, but let us concern ourselves—

The Court: With that invitation, I will overrule the objection.

Mr. Sacher: —with what Mr. Gates did, not with what other people did, because it is Mr. Gates who is on trial and not other people.

The Court: I will overrule the objection. Go ahead.

Mr. Crockett: If the Court please, I ask that the

—Tr. Tr. 6950—

Court reconsider that in the light of the previous suggestion by your Honor that you would like to have briefs filed tomorrow morning before 10 o'clock. I submit that there is law that supports the proposition that Mr. Gates would be within his rights in refusing to answer such a question and that we are within our right in objecting to the prosecutor putting such a question, calling for these names. And I have a further suggestion—

The Court: I heard that, I heard that. You don't have to say it three or four times.

Mr. Crockett: No, I am not going to repeat that. What I wanted to add is a suggestion—

The Court: All right.

Mr. Crockett: —that Mr. McGohey might very well go to another question and tomorrow—

The Court: That is just what I was about to say, but you want to say it.

Mr. McGohey, why isn't it practical, until I have had time to consider such authorities as they sub-

mit, that you go to some other subject and take up the matter again at that point in the morning?

Mr. McGohey: Very glad to do that, your Honor.

By Mr. McGohey:

Q. Do you still hold the position as director of veterans' —Tr. Tr. 6951— affairs? A. I do not.

Q. Who holds that position now?

Mr. Gladstein: Same objection, your Honor, as before, unless it is a defendant on trial, and I submit that the question should be withheld pending—

The Court: It is becoming pretty obvious to me that you cannot try this case with defendants saying what they want to tell and what they don't want to tell, and what questions they want to answer and what ones they don't.

Mr. Gladstein: No, your Honor, that isn't it. It is only the same question. It isn't a series of questions. It is only one question involved and that is whether it is right to ask this man to identify other persons who are not involved in this case, in such a manner that tomorrow they might be indicted merely because they were engaged in political activity.

The Court: I have heard that again and again. Let us not repeat it. If there ever was a case in the world which had as much repetition as there is in this case, I don't know when it was.

Mr. McGohey: Does your Honor desire that that question be—

Gates—Cross
Colloquy

The Court: I desire, Mr. McGohey, that you wait until after I have studied what authorities may be
—Tr. Tr. 6952—
submitted to me in the morning before you ask Mr. Gates questions about who the persons were that were connected with the activities of the Party in one way or another; but if you find it difficult to do that, why, then, we can put it off but, I think, perhaps you can go to other matters that will not involve such questions, and then I will rule on it after I have studied what the defendant submit to me.

Mr. McGohey: Well, if the Court please, it is now 4.15. I have prepared my cross-examination along the lines that I have been proceeding on and it would throw it completely out of joint for me to make a switch now.

The Court: Very well.

Mr. McGohey: I would prefer to go along this line after the Court has ruled on it.

The Court: All right.

Mr. McGohey: And then I can eliminate, if necessary, in accordance with the Court's ruling, a whole line of cross-examination.

The Court: Very well.

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—Tr. Tr. 6954—

New York, June 3, 1949

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Cross Examination by Mr. McGohey (Continued):

Q. Mr. Gates, you will recall that yesterday afternoon I asked you this question:

"You were the Veterans Director?"

And you answered "Yes." And then,

"As Veterans Director were you in charge of any commission?

"Yes.

"What was the name of that commission?"

And you answered,

—Tr. Tr. 6955—

"The National Veterans Committee." I said, "National Veterans Committee?" You said, "Yes.

"Were there other members of that committee besides yourself?

"There were.

"And how many?

"Oh, it varied greatly from time to time. I cannot recall exactly now."

Then I asked this question:

"At the time you assumed the directorship, how many were there?

"I should say somewhere between five and ten."

And then I asked this question:

"Will you tell us who they were?"

And then there was a discussion and that question was not answered.

I now repeat that question to you, Mr. Gates; will you tell us who were the members of the Veterans—the National Veterans Committee at the time you assumed the directorship of that committee?

Mr. Sacher: I object to that question.

The Court: Objection overruled.

—Tr. Tr. 6956—

Mr. Crockett: I should like, with the Court's permission, to be heard very briefly in support of the objection.

The Court: I don't want to hear any argument at this stage.

Mr. Isserman: If the Court please, I would like to state the grounds for the objection.

The Court: I do not desire to hear them. You know, I have had the brief, rather lengthy brief, which I have studied with very considerable care. I have given this matter a great deal of study overnight, and I have heard considerable argument of counsel in my chambers this morning. I do not feel that I need to hear anything further now as to the materiality and relevancy of the question.

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Gates—Cross
Colloquy

—Tr. Tr. 6958—

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Mr. Crockett: The argument I wish to address to the Court is not included in the memorandum that was presented to the Court.

The Court: Well, I will hear you briefly.

—Tr. Tr. 6959—

Mr. Crockett: I am particularly anxious to address the Court on this subject because I am mindful that if the abolitionist of another day had not taken the same position as Mr. Gates has taken today, I probably would be a slave instead of a free American citizen.

And I think it is recognized, and it is a matter of common knowledge, that racial, religious and political prejudice does exist in the United States and that various minority groups are victims of such prejudice. The fact that we have pending in the Congress today an FEPC Bill, the fact that the President has seen fit to issue an Executive Order to the armed forces, confirms that basic fact, that there is prejudice against minority groups. It is also well known, and I think the Court might judicially notice, that members of minority groups frequently escape economic, social, political and other evil consequences of this prejudice by either passing as white, when they are really Negroes, by changing their names, spelling or pronunciation, or changing their ancestral religious affiliation, or their dress, or refusing to reveal their political identity. There are those of us who may be—

The Court: This argument is designed to convince me that the question put to the witness is material

—Tr. Tr. 6960—

and relevant?

Mr. Crockett: Not that it is material and relevant but that it is improper.

The Court: Well, that it is not material and relevant.

Mr. Crockett: That is right.

The Court: I don't quite see the bearing of what you say to the subject matter but, however,—

Mr. Crockett: There may be those of us who are possessed of a little more moral fortitude and, hence, are proud to disclose our race or our religious background, or our political connections, and we may even disapprove of concealment of these facts on the part of others.

The Court: Is this an argument for the benefit of the jury or for me?

Mr. Crockett: Not for the benefit of the jury but for your benefit.

The Court: I see.

Mr. Crockett: But our disapproval of such concealment is only slightly less than our repugnance at those who violate their fellow citizens' right to privacy and the right to remain silent.

This principle which I am advocating is recognized in our law. For example, our law books look with extreme disfavor—displeasure, rather,—upon a doc-

—Tr. Tr. 6961—

tor or a lawyer or a priest who betrays the confidence of his patient.

Gates—Cross
Colloquy

The Court: I will hear you no further, Mr. Crockett. It was just what I was afraid you were going to do.

Mr. Crockett: What I am arguing for is a recognition—

The Court: I will not hear you any more. I do not desire to hear anything further.

Mr. Crockett: I am asking for the privilege of referring to religious affiliation—

The Court: Mr. Crockett, I don't desire to hear anything further. I overrule the objection.

Mr. Gladstein: Will your Honor then instruct the witness as to his rights under the First, Fourth, Fifth and Tenth Amendments of the Constitution of the United States to refuse to place himself in the same position, degrading himself, that other people willingly—

The Court: He has conferred—

Mr. Gladstein: —willingly took—

The Court: —with his counsel.

Mr. Gladstein: —if your Honor please—

The Court: I will not hear more.

Mr. Gladstein: —when the Government placed informers and stool pigeons on the stand.

Will you be good enough to advise the witness.

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—Tr. Tr. 6970—

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Defendant Dennis: I would like to call to the attention of the Court that to give any information

would be not only to transgress the inalienable rights of the defendants, of the members of our Party, but would be to put anyone mentioned by Mr. Gates in a position where he would only be subject to lynching in the South. And I say that this line of question, among other things, is an un-American effort to infringe on our basic rights and to try and compel the defendants to act as police, as FBI informers; and I would say that if the Court accedes to the request of the prosecution and if it does not sustain our objections, that this would be a violation of the traditions embodied in our Bill of Rights, this would be acting in the traditions of Edgar Hoover and Herr Himmler because such rulings could only be conceived and executed in the spirit of a police state inquisition.

The Court: I think I have heard about enough, Mr. Dennis.

Defendant Dennis: I would say in conclusion, your Honor, that no court or no legislative body can kill ideas, political doctrines, movements of the people, such as the Communist movement. They can't do

—Tr. Tr. 6971—

that by force whatever the form of compulsion. And similarly no court by force or compulsion—

The Court: I would rather not hear any more, Mr. Dennis.

Defendant Dennis: —can compel any Communist or any reputable working—

The Court: Don't you think it would be better—

Defendant Dennis: —to bear false testimony and act as an informer against his associates.

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Gates—Cross
Colloquy

—Tr. Tr. 6973—

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The Court: Now Mr. Gates, pursuant to the authority vested in me by Title 18 of the United States Code, Section 401, which reads as follows,

"Power of Court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—"

and then the 3rd subdivision reads

"Disobedience or resistance to its lawful writ, process, order, rule, decree, or command"

I now adjudge you guilty of a wilful and deliberate contempt, and by reason thereof I sentence you as follows:

You are to be remanded until you have purged yourself of your contempt for a period not to exceed 30 days.

(The defendants stand in the courtroom.)

Defendant Winston: If your Honor please, may I now be heard? More than 5000 Negroes have been lynched in this country for such—

—Tr. Tr. 6974—

The Court: Now, Mr. Winston—

Defendant Winston: —and the Government of the United States should be ashamed for bringing in such monstrosity.

The Court: Mr. Winston, I hereby direct that you be remanded for the remainder of the trial.

Defendant Hall: It sounds more like a kangaroo

court than a court of the United States. I have heard more law and more law and more constitutional rights in kangaroo courts.

The Court: Now let me see, this is Mr. Hall—

Defendant Hall: That is right, this is Mr. Hall.

The Court: Mr. Hall, you are hereby remanded for the balance of the trial.

Mr. Gladstein: If your Honor please, may I ask this, in pronouncing sentence as the Court just did, did the Court consider that the witness had invoked the protection of the Fifth Amendment, or did it consider that the state of the record was such that perhaps technically the witness had not done so? I wish to call Mr. Gates' attention to the fact that he may not have used—

The Court: Don't you think, Mr. Gladstein—

Mr. Gladstein: I beg pardon?

—Tr. Tr. 6975—

The Court: Don't you think it would be prudent if the defendants resumed their seats?

Mr. Gladstein: Well, your Honor, may I first have a ruling on the right of the witness to complete the record of his invocation of his rights under the Fifth Amendment because I think there may be a possibility that he did not in his last answer, although it is clear that he intended to, to invoke that amendment, and I desire to have the record corrected to that extent and to advise the witness, and I think the Court should corroborate it, and under the Fifth Amendment to the Constitution he has a right to state from the witness stand that he declines to

answer a particular question upon the ground that it may tend to degrade or incriminate him?

The Court: Your objection is overruled.

Mr. Gladstein: Well, may we have the record clear, your Honor, that whatever the determination or disposition of the Court may be, it is deemed that the witness has invoked that right of his under the Fifth Amendment?

The Court: I will make no further direction.

Mr. Gladstein: Well, may I say to Mr. Gates now that he should state for the record in open court that he does invoke that protection and he wishes that to be considered by the Court prior to pronounc-

—Tr. Tr. 6976—

ing any disposition or judgment of contempt.

The Court: I have pronounced the sentence.

Mr. Sacher: I should like to say, your Honor, that I regard the record as stating very clearly and adequately by both Mr. Gates himself and by myself that he did invoke both the First and Fifth Amendments prior to the imposition of any sentence by your Honor.

The Court: You might be interested in my reading from my notes here. I understood him—

Well, perhaps I had better not read from my notes. It will perhaps just lead to further argument and the record stands as it is.

The Witness: I did invoke those two Amendments.

Mr. Isserman: If your Honor please, the answer should be read to Mr. Gates so, that he can judge whether he completed it or not.

The Court: He can purge himself, at any time

under the sentence that I have given him; otherwise the sentence stands.

Defendant Dennis: I wish to protest most emphatically this outrageous decision on the part of the Court. I must say all honest men must view this action of demanding as a contemptible action, a violation of our traditions and our Bill of Rights—

The Court: I shall treat you, Mr. Dennis, as one

—Tr. Tr. 6977—

of the counsel, as indeed you are, and I have tried to stick to my determination that I shall not do anything to counsel. They may do whatever they choose and take the consequences in due time. I do not state that as a guarantee that I will not take some action against you if you become too disorderly, but I speak as I have because I want you to realize that I understand the character of the expression which you have just used, but I will take no action on it.

Defendant Dennis: I wish the Court to know that I seek no special rights or privileges, but the rights I exercise—

The Court: I think I understand your position pretty well.

Defendant Dennis: My inalienable rights as an American citizen, as an American worker, as a Communist, whether I—

The Court: If you desire to add something further you may do so, Mr. Dennis.

Defendant Dennis: Well, first I would like to urge upon my co-defendants that they at this time do not speak—they can act as they see fit. I urge them not to call for any provocation.

(Defendants sit down.)

Mr. Isserman: If the Court please, from my con-

—Tr. Tr. 6978—

sultation with Mr. Gates this morning I know that he has not, and as I heard his claim of privilege, stated it as he wanted to state it this morning. I don't think the Court should act under a misapprehension or a mistaken statement by a defendant who is not versed in the law; I think Mr. Gates should be given an opportunity to state the privilege that I know, from talking to him, that he intended to claim, particularly in regard to self-incrimination.

The Court: Well, I think that Mr. Gates' situation is now closed and we will have the jury back and resume the trial.

Mr. Sacher: I should like at this time to request—

The Court: (To Bailiff) Just a second.

Mr. Sacher: —to request of the Court a stay of your Honor's order pending an opportunity to apply to the Circuit Court of Appeals for a stay or a reversal.

The Court: I will grant no such stay.

Mr. McCabe: If your Honor please, I ask that your Honor revoke your Honor's order with regard to the defendant Winston because of utterances made by the defendant Winston. The utterances were made under provocations which should stem not only

—Tr. Tr. 6979—

from the history of this trial but from the history of this country, the history of persecution of minority races antedating the founding of this country—

The Court: Now, Mr. McCabe, I have in this case throughout attempted in every way to be patient,

never to take a hasty step without careful consideration. I have pursued a policy of gradually reducing the disorder here by ample warnings; and only a few days ago, after having heard outbursts by several of the defendants I had occasion, when there were some comments made by the defendant Davis, to state in very plain and unequivocal terms that if there was any further disorder by any of the defendants I should remand them. There was further disorder, and I have remanded those who caused the disorder. The other matter will rest, and I hope that the remainder of the trial may proceed without a repetition.

Mr. McCabe: May I add, then, your Honor, that I do not accept in any way the strictures your Honor has directed, either towards the defendants or to counsel. I say that your Honor has not remanded the persons who caused the disorder because the defendants did not cause the disorder. I say that the reason counsel—I am speaking for myself now—the reason that I have perhaps not made similar utterances is simply because of my greater training to restrain myself under great provocation.

—Tr. Tr. 6980—

The Court: Well, you have been impudent enough to me on numerous occasions, and were it not for the fact that I have determined that this trial shall not be disrupted by such things I should have taken action against you and against each of your colleagues long before this, but I shall not do it. I shall leave that to the proper authorities to take care of in due course, and there it shall rest, but you need

be under no misapprehension; I have been quite fully cognizant of your contemptuous conduct and your impudence.

Defendant Winter: Your Honor, may I—

Mr. McCabe: I deny the imputation of impudence or misconduct. I am perfectly willing to answer to any proper body for any actions of mine in this courtroom or out.

The Court: Do you remember, Mr. McCabe, the date when you accused me of doing certain things just so that the reporters could meet the deadline for the press? Do you remember that occasion?

Mr. McCabe: Yes, I recall it quite well.

The Court: You thought what you said then was entirely proper, no doubt.

Mr. McCabe: I thought it was accurate.

The Court: Well, yes, I thought it was contemptuous. Now I just mention that so that you may not

—Tr. Tr. 6980a—

suppose that I am not aware of the precise incidents that I speak of.

Now I think we had better go on with the trial before you make your situation any worse.

Mr. Sacher: May I request a brief recess, your Honor?

The Court: Yes. We will take a ten-minute recess.

(Short recess.)

Gates—Cross
Colloquy

—Tr. Tr. 6981—

(The jury returned to the courtroom.)

(The witness resumed the witness chair.)

The Witness: Your Honor, I would like to say for the record that I thought I made the statement, but if I did not I would like to make sure that the record contains the statement that I did not answer the question on the ground of my privileges under the First and Fifth Amendments, on the ground that it would tend to degrade and incriminate me.

Mr. Gladstein: Now, if your Honor please, I wish to make a motion that the Court revoke and withdraw the order and announcement made before the recess remanding my client, Mr. Hall, for the duration of this trial into custody, and I assert first that the finding is improper.

The Court: The jury may be excused again.

(The jury left the courtroom at 12.07 p.m.)

Mr. Gladstein: If the Court please, there are five or six grounds upon which I ask the Court to withdraw and vacate the order which was orally made just before the recess pronouncing Mr. Hall in contempt and imposing upon him, as I understand it, the sentence that he be remanded to the custody of the jailers and remain in that custody for the duration of this trial.

I assert in support of my motion first, that it is obvious from the circumstances and from the con-

—Tr. Tr. 6982—

tents of the words used by Mr. Hall that there was no intention to commit any contempt of court.

Secondly, I assert and submit that the words used and the circumstances under which they were used were occasioned by a situation provoking that occurrence and stemming directly from rulings of the Court and from proceedings had immediately prior theret.

Third, I submit that the actual words used by Mr. Hall do not and cannot by the farthest stretch of the imagination constitute a contempt of the Court.

Fourth, I submit that nothing that Mr. Hall said or did either in fact or with any degree of possibility could have been intended to accomplish, nor did it accomplish any imemdiate interference with the judicial processes.

Fifth, I assert that the penalty which the Court has imposed interferes seriously to the prejudice of the rights of Mr. Hall with his defense, with a fair trial, interferes with his right to and opportunity to secure adequate legal representation inasmuch as the sentence of the Court places obstacles and difficulties that can have no other effect than to impair the possibility of his receiving legal assistance, counsel and advice in the preparation of his defense in this case.

And finally, I submit, your Honor, that the extent of the sentence which your Honor has imposed is

—Tr. Tr. 6983—

completely out of line with the incident that oc-

curred. Not only is it, I submit, indefensible for the Court to have made that finding, but having made the finding I submit it is a very unique, unusual and extreme penalty to impose in all the circumstances of this case upon the defendant Hall.

And I would finally urge this: what we have been witnessing this morning is something that is deeper in the hearts and minds of men who have the convictions that these defendants have, than apparently the Court can understand.

The Court: You have in mind the background and what has been happening these past months?

Mr. Gladstein: I have in mind 300 years of background. I have in mind that those who founded this country did so in part because they had to leave England because there was the kind of political persecution which we are witnessing in our country today, and I know from the history books that the ecclesiastical courts for religious purposes and the star chamber for political purposes were used precisely the way this court is sought to be used, namely, as a grand jury inquisition, as subterfuges by which to extract from witnesses on the stand the names of others who might be intimidated into becoming witnesses against them.

—Tr. Tr. 6984—

The Court: Proceedings in the District Court of the United States while I am presiding will be as orderly and free from misbehavior as I can make them.

Mr. Gladstein: Your Honor, we desire to and we have attempted to be orderly and we want—

The Court: Attempted to be orderly?

Mr. Gladstein: If your Honor please, I submit that the expression that is provoked from a man should be measured in the light of what it is that that expression deals with, and when you touch something as profound as what is involved here, then it is only fair to expect that men will fight for principles that they believe in, principles that represent the very aims of their existence.

The Court: They had better not be disorderly in this court.

Mr. Gladstein: I desire to submit to your Honor that any expression by any of the defendants should be gauged in the light of what is here involved. We are not engaged in something trivial. We are dealing with something that constitutes one of the cornerstones of our very government. I urge the Court to reconsider the ruling it has made against Mr. Hall in the light of what I have submitted, and if the Court will not revoke that order, to suspend it permitting me on behalf of Mr. Hall to submit the matter to the Court of Appeals.

—Tr. Tr. 6985—

The Court: The motion is in all respects denied. Bring the jury back.

Mr. Sacher: Before they come back—

The Court: Don't call them back.

Mr. Sacher:—I wish in the light of the statement made by Mr. Gates since the reconvening of court, your Honor won't reconsider the order which you made committing Mr. Gates.

In that connection I think that it ought to be

pointed out to the Court that recently the Circuit Court of Appeals in this Circuit held that where there is any possibility at all that an answer might expose a witness to possible prosecution that he may lawfully and legitimately invoke the principle that the answer would tend to incriminate and degrade him. I have in mind the Fifth Amendment. Mr. Gates has done so, he has invoked them and I will do so by reference to the statutes, if your Honor wishes.

The Court: I will not change the order.

Mr. Sacher: When all things are balanced, when you have due regard for the questions put by the prosecution, the declination to answer which was the basis of your Honor's order, when you weigh that against the principles which are involved—in other words, when account is taken of the purposes of the prosecution in putting those questions, since the purpose is not to elicit the facts—

—Tr. Tr. 6986—

The Court: I am not going to assume that because you or your colleagues make statements that the truth of those statements is thereby established. You accuse the prosecution of bad faith, evil intentions, and so on. I see no evidence of that.

Mr. Sacher: I say to your Honor that when you bear in mind that the answer, when given, cannot in any way, affect the substantive aspect of Mr. Gates' testimony, when you bear in mind that what is involved in the case cannot conceivably be affected by a yea or a nay or by whom he names—

The Court: No one can tell what will affect the

credibility of a witness in the mind of a juror. His false statement in any particular, or found to be such, however trivial the matter might be, is something no—

Mr. Sacher: That is the danger—

The Court: —one can tell.

Mr. Sacher: —that large political ideas may be decided on the basis of trivia, and I say to your Honor that precisely because of that danger, it is warranted here to ask your Honor not to require this witness to answer, even if there weren't the danger—

The Court: Now, Mr. Sacher—

Mr. Sacher: —that I have referred to.

The Court: I will hear no futher argument from you.

—Tr. Tr. 6987—

Mr. Sacher: Then I desist.

The Court: I now desire to have the jury return.

* * * * * *

—Tr. Tr. 7060—

New York, June 6, 1949

* * * * * *

Mr. Gladstein: Mr. McGohey, would you pardon an interruption?

Mr. McGohey: Yes, certainly.

Mr. Gladstein: I am sorry, I misunderstood the purport of the Court's ruling. I didn't undestand that your Honor was ruling that any impeachment could be offered by the reading of the newspaper ac-

count, no matter what that newspaper might be, and I thought that Mr. McGohey's purpose, in showing the newspaper to the witness, was to use it as a basis for asking him questions so as to determine whether or no anything in that newspaper was relevant to the inquiry, but it now appears that what Mr. McGohey has done has simply been to obtain a ruling whereby he reads to the jury a newspaper account

—Tr. Tr. 7061—

without having asked the witness anything whatsoever about that, thus, I take it, hoping, that is, Mr. McGohey hoping, and with the apparent sanction of the Court, that it will be not until the redirect examination, long after this incident has occurred, that we will be permitted to bring out whatever facts there are that are involved in this matter.

I submit that no newspaper account can possibly ever be used in that manner, and while my objection may be tardy, I trust that your Honor will reconsider this, especially since it all began with the idea of whether or not the masthead of that newspaper read in a certain manner.

—Tr. Tr. 7062—

The Court: Well, you know, Mr. Gladstein, it is very difficult to deal with you because, despite my repeated statements that I did not desire argument when you make an objection you seem to be physically and intellectually incapable of making objections without a lengthy argument. Now I understand your motion, and it is denied.

—Tr. Tr. 7123—

New York, June 7, 1949

* * * * *

Q. Will you give us the name of any branch that you belonged to during that period?

Mr. Sacher: I object to that, if your Honor please.

The Court: Overruled.

Mr. Sacher: I should like to observe that the defendant is being tried—

The Court: I think the least observation you make, the better, Mr. Sacher.

Mr. Sacher: Well, your Honor, I submit that—

The Court: Don't start shouting at me again.

Mr. Sacher: What is that?

The Court: I say, don't start shouting at me again.

Mr. Sacher: I am not shouting and I resent the filling of the record with statements about my shouting when all I am doing is speaking vigorously, and that, I think, is part of the function of an advocate.

The Court: I think you are one of the most vigorous speakers I have ever heard.

Mr. Sacher: That may be, but I say to your Honor that I resent this trying the defendant for things that came 15 years or 18 years ago, and I sub-

—Tr. Tr. 7124—

mit that what he is being tried for is what is charged in the indictment between the years April 1, 1945, and July 20, 1948, and I also wish to say to your Honor that I don't think—

The Court: You will please desist from further statements now, Mr. Sacher.

Mr. Sacher: Well, I just wish to make this protest—

The Court: You are now proceeding in direct and wilful disobedience of my command.

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—Tr. Tr. 7189—

New York, June 8, 1949

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Mr. Sacher: I represented to your Honor that it had not been inquired into. I said, "That has not been covered by this witness as to this inquiry. It is absolutely new."

The Court: I remember.

Mr. Sacher: I said, "I went through the record and I make that representation to the Court."

And you simply said, "Go ahead. Go ahead."

—Tr. Tr. 7190—

The Court: That's what I said but what I thought was my recollection differed from yours.

Mr. Sacher: Well, there is the record, your Honor.

The Court: I say, there is the record too. Objection overruled.

Mr. Sacher: May I respectfully request that it be indicated what other page in the record there is at which I interrogated the witness concerning this?

The Court: No, I don't intend to take a recess to do that after all the adjournments we have had for various reasons. I don't intend to take an adjourn-

ment to read through five or six hundred pages. I allowed you every opportunity to go into these matters and then you got to repeating, changing a little bit, but the same subject matter again and again so that I finally began sustaining the objections.

Mr. Sacher: I once again represent to the Court that I had not—

The Court: Mr. Sacher, your representations are not impressive.

Mr. Sacher: Well, I respectfully object to that kind of statement.

Mr. Crockett: I want to note an objection to that insulting remark.

—Tr. Tr. 7191—

The Court: To what?

Mr. Crockett: To the insulting remark directed to Mr. Sacher. I ask that the Court direct the jury to disregard it.

The Court: Well, that is just another mark up against you.

Mr. Crockett: I object to that threat coming from the Court.

The Court: You know, when you use the expression "insulting" to the Court it doesn't require a great understanding of the obligations of the bar to realize that that is grossly improper.

Mr. Crockett: I think the record indicates—

The Court: If you do not realize it already perhaps there will come a time when you will.

* * * * *

—Tr. Tr. 7272—

Furthermore, Mr. Sacher had complained that he had been unable to have an appropriate and adequate interview with his client at the House of Detention over the week end, and one of the specifications in that complaint was that it was necessary to interview his client through a small aperture of some kind which made it difficult if not impossible to pass back and forth exhibits if they were of any size.

Mr. Sacher: No, no, we were not permitted to pass any.

Mr. McGohey: No, I say you were not permitted—no, I don't say that; I say I understand you to say that by reason of the physical condition of the place it is impossible—

Mr. Sacher: I say it is not permitted and it is true.

The Court: That is what Mr. Sacher said.

Mr. McGohey: Regardless of that—

Mr. Sacher: I am offended on these constant aspersions on the veracity of representations that I make. I am an officer of this court and I resent these—

The Court: There was an instance when you deliberately lied to me when they were passing these press releases. You said that they were not and you were caught red-handed.

—Tr. Tr. 7273—

Mr. Sacher: That is the most offensive charge that can be made against an officer of the court. Your Honor knew that that was happening in the

back part of the courtroom and I was unable to see that. That is one of the most offensive things you can do to a lawyer. What has a lawyer got but his honor.

The Court: That is the first thing you did and you were caught red-handed.

Mr. Sacher: That is the most detestable thing I ever heard from a judge. I resent that and I urge that it be expunged from the record.

The Court: You asked me why I wouldn't take your word for anything and I told you. I might enumerate other incidents were I so inclined. You can get just as violent as you want; the fact is I do not take your word for anything.

Mr. Sacher: I will defend my honor as a member of the bar against your Honor or anybody else. I will not accept a denunciation that I am a liar, When the time comes that I don't have the mental capacity to defend my clients on any other basis than lying I will resign from the bar. I think an idiot resorts to lying. I don't have to do it.

The Court: You did it.

We better let these little amenities go. I can see from your belligerent manner if you thought you could, you might physically come up to the bench

—Tr. Tr. 7273-A—

and physically attack me. I know your manner, and it doesn't frighten me in the slightest degree. Let's get back to what we were doing.

—Tr. Tr. 7274—

Defendant Dennis: Do I understand by your Honor's remarks that you now wish to deprive not

only the defendant Gates of his liberty but to deprive him of the right of counsel, as well as the other defendants who are represented—

The Court: No.

Defendant Dennis: —by Mr. Sacher?

The Court: I think you are mistaken in that view, Mr. Dennis.

The Witness: I don't think Mr. Dennis is mistaken because I want to cite some facts for the record. Since last Friday, when you incarcerated me, I haven't been able to see a copy of the transcript. I haven't read the transcript. Since that time I haven't been able to get hold of copies of the History of the CPSU and other exhibits which I knew that the prosecution would cross-examine me on, and I have not in any way, outside of a few talks that I have had with Mr. Sacher, which have been entirely inadequate, an opportunity to prepare for my cross-examination. I haven't had the same opportunities that Mr. McGohey has to look through the transcript and to look through exhibits like the History of the CPSU, which contains hundreds of pages; and others. And, therefore, I say that I am being impeded, despite what Mr. McGohey says and despite what your Honor says, in my defense.

—Tr. Tr. 7275—

The Court: Mr. McGohey—

Mr. Crockett: I wish—

The Court: Oh my, Mr. Crockett. You have something to add?

Mr. Crockett: I have something very important to add. I wish at this time to move for a mistrial

upon the grounds that the Court in its remarks immediately prior to this time has definitely indicated a closed mind with reference to anything that Mr. Sacher might say. The effect of that is to deprive—

The Court: I have a very definite opinion of you, too, Mr. Crockett.

Mr. Crockett: But I am not speaking about Mr. Crockett, and I am fully aware that you probably do have a very definite opinion as to Mr. Crockett.

The Court: But I shall not express it because I see no occasion to do it. I should not have done it to Mr. Sacher, had he not asked me.

Mr. Crockett: I am not speaking about Mr. Crockett.

The Court: Why, I have never been so insulted and baited, nor have I ever heard of any other judge being so insulted and baited, during the trial as I have by you lawyers representing the defendants here in this case from the 17th of January on,

—Tr. Tr. 7276—

and I will make no bones about it. That is what has been going on, and I have tolerated it because of the reasons I have indicated, but make no misunderstanding as to what I think about it.

Mr. McGohey: Your Honor, I wish—

Mr. Crockett: I wish to state the grounds for my motion.

Mr. McGohey: Will you pardon me for just a moment? Because all this developed as an interruption when I was trying to make a report to your Honor.

The Court: Yes.

Gates—Cross
Colloquy

Mr. McGohey: If I can complete that report—

The Court: The motion is denied, Mr. Crockett.

Mr. McGohey: —and if we are not able to do it, I should like to ask to adjourn now because I am very tired.

The Court: Will you see what you can do about giving Mr. Gates every facility consistent with the circumstances?

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—Tr. Tr. 7311—

New York, June 9, 1949

* * * * *

Mr. Gladstein: Your Honor, I object to this method of examining, no foundation has been laid that Mr. Gates of his own knowledge within the confines of the strict rules of evidence and proof, which we do not follow here—

The Court: Ah, you do have such a way of expressing yourself.

Mr. Gladstein: Well, it is true. Anybody can read a newspaper and say that Mr. Vishinsky has a certain position or Mr. Byrnes has a certain position or someone else.

The Court: You remember my direction some time ago that if somebody was going to object he may do so, but not argue?

Mr. Gladstein: Yes, I object, but on the ground—

The Court: When you go on to the ground that is where the trouble starts. I can't find any testimony

because there is argument, argument, argument. You object and I overrule your objection. Now go ahead.

. . . . . .

—Tr. Tr. 7330—

. . . . . .

Mr. Sacher: I object to that on the ground that the application is the best evidence.

The Court: Overruled.

Mr. Sacher: This calls for the contents of a written paper.

The Court: He is asking for his recollection as to whether or not—

The Witness: I have already answered that I did not use the name John Gates in that instance. That was the one exception—17 years.

Q. No. My question, Mr. Gates, is did you in that application state that the name that you had consistently used was John Gates?

Mr. Sacher: Now if the Court please, I say this question does call for the contents of a written paper and is not designed to refresh his recollection. Secondly, it creates the impression that the application inquired concerning the consistent use of a name, and I challenge Mr. McGohey to produce any such—

The Court: Mr. Sacher, have you and Mr. Gladstein had an understanding that you would deliberately flaunt my direction that you not argue matters of objection to evidence? Because not only do you

—Tr. Tr. 7331—

both go ahead here in complete disregard of what I have said—have you had some understanding about it?

Mr. Sacher: Not only don't we have any such understanding, your Honor, but I assure you that what I did was unintentional. I have no desire to violate any of the Court's instructions.

Mr. Gladstein: May the record show, your Honor, that I have no understanding with Mr. Sacher or anyone else to deliberately flaunt your Honor's rulings, nor do I personally intend nor have I intended—

The Court: You do it inadvertently, do you?

Mr. Gladstein: I beg your pardon?

The Court: You do it inadvertently every time?

Mr. Gladstein: Your Honor, I submit that I have not flaunted your Honor's rulings.

The Court: You know, it is very easy—and I speak to both of you and your colleagues—it is very easy to do what has been done on numerous questions, ask my leave to state objections and make argument, and where I think that is going to be helpful I have allowed it. Now I hope you will pay a little more attention to it. It doesn't seem to me that it should be necessary for me to do more than speak the way I have, but sometimes people think unless you shout and bang the gavel and make a big noise you don't mean what you say. Now please try

—Tr. Tr. 7332—

to accommodate yourself to my directions.

I will overrule the objection.

* * * * *

—Tr. Tr. 7361—

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Q. Now, Mr. Gates, have you ever been convicted of a crime? A. I have testified to two arrests and two convictions on direct examination.

Q. Two convictions— A. What is that?

Q. Two convictions for crime.

—Tr. Tr. 7362—

Mr. Sacher: Just a moment.

A. I am not a lawyer.

Mr. Sacher: Don't ask the witness for a legal conclusion. I do not know whether it is an offense or a misdemeanor in Youngstown, and I object unless the witness knows what the legal import of those offenses is.

The Court: I will permit the witness to continue his answer.

A. (Continuing) I don't know from the point of view of legal terminology whether what I was convicted of is classified as a crime or a misdemeanor or whatever it is. I was convicted, as I testified before on the direct examination, in the year 1933 for making a loud noise, without a permit, in an action, in a demonstration, in a meeting where I tried to speak on behalf of relief and unemployment insurance, and I think that my action—

Mr. McGohey: Now, if your Honor please, I submit that the witness has answered the question sufficiently at this point.

The Witness: No, I haven't; I haven't completed it.

The Court: Well, I should think the answer would have been yes or no.

Will you read the question to me?

Mr. Sacher: No; I take exception to that, your

--Tr. Tr. 7363--

Honor, because there are such things as offenses which do not rise to the import of crime and consequently if that is the kind of thing it is, then I submit—

The Court: Then the witness could say so without all this extraneous explanatory matter that he keeps putting in all the time, that is not responsive.

Mr. Sacher: But I am a lawyer and I don't know because I haven't seen what the law of Ohio provides in regard to that matter.

The Court: I suppose not.

Read the question to the witness.

(Question read as follows: "Now, Mr. Gates, have you ever been convicted of a crime?")

The Court: Have you ever been convicted of a crime? Now what is the answer?

The Witness: I began to answer that by saying I don't know whether that is classified as a crime in Ohio. I don't have the legal knowledge. I did testify—

The Court: Well, I don't want a long explanation.

The Witness: I am not making a long explanation. Let me answer. I did testify on direct examination—why don't you read the transcript? This is repetitious. I testified on the direct examination as to what I was convicted of, and Mr. McGohey knows it very well—

The Court: You are very violent, Mr. Gates, with

—Tr. Tr. 7364—

out the slightest possible justification.

The Witness: Well—

Mr. McGohey: And may the record show, your Honor, that the witness has been shouting when he made that last answer.

The Court: Gesticulating.

Mr. Sacher: May the record show that the witness is being crucified unnecessarily with interrogations to which he has truthfully answered already.

The Court: Mr. Sacher, that remark is wholly improper, and it will be stricken out.

Mr. Crockett: May the record show that this is the fifth day of the witness's imprisonment in jail.

The Court: You will not provoke me into any answer that I may regret later, Mr. Crockett. You and Mr. Sacher and the other lawyers have tried so hard for so many months but I think I can continue calmly.

Mr. Sacher: I object to that. We are the ones who are being injured and we are not being permitted to complain of the injury that is being inflicted on us. I think in the present state of the record, your Honor, it ill becomes anybody here to claim any martyrdom.

Gates—Redirect
Colloquy

The Court: You will please desist from comments of that kind, Mr. Sacher.

. . . . . .

—Tr. Tr. 7374—

. . . . . .

The Court: I see Mr. Sacher smiling.

Mr. Sacher: Your Honor takes awfully good notice about my facial expressions, but when Mr. Gladstein spoke about Mr. Gordon jumping up like a poppinjay you saw nothing.

The Court: Well, you did seem pleased. Now you seem different.

Mr. Sacher: We are under surveillance but you never see anything that the prosecution does.

The Court: That is what you say. It may be because there is nothing done by the prosecution to make it necessary for comment.

I told you some little time ago that I wasn't going to permit you or the other lawyers to get away with anything while I was presiding here and I shall not.

. . . . . .

—Tr. Tr. 7486—

New York, June 14, 1949

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Q. Did you tell the representative of the State Department what your name was?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you tell him why you had stated your name to be Isriel Ragenstrich in your passport application?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. McGohey: Now, if your Honor please, I now ask your Honor to instruct Mr. Sacher to desist from this examination.

The Court: Yes. There can be only one purpose, which is not proper; so that you will please desist from asking any further questions about what the representative of the State Department may or may not have asked him.

. . . . . .

New York, June 15, 1949

—Tr. Tr. 7648—

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Mr. Isserman: . . . Now as against the Eudenz testimony, any inference—and I notice your Honor

—Tr. Tr. 7649—

shook his head, indicating that there was no inference—

The Court: Just now?

Mr. Isserman: No, before, as to the Duclos article. I believe, your Honor—

The Court: I have to watch my step here. I wasn't cognizant—

Mr. Isserman: Well, whether your Honor agrees with it or not—

The Court: I wish you would stop talking about my nodding my head, scratching my head and pulling my ears. Why don't you leave that all out? What good does that do?

Mr. Isserman: Well, whether your Honor—

Mr. Crockett: Pardon me one minute. I think it is very important because there are some things that are not made a matter of record on the Court—

The Court: You haven't missed any of them.

Mr. Crockett: —so far as the transcript is concerned. Very frequently I notice in the course of testimony your Honor makes frequent glances over toward the jury or some facial expression that gives the impression, to me at least, that the Court—

The Court: Well, it is funny—

Mr. Crockett: Pardon me. I think that whenever it is so obvious, as it was a while ago, some mention

—Tr. Tr. 7650—

of it should be made so that it will be carried in the record.

The Court: If there is something about my winking at the jury or something of that kind, I am surprised that you did not mention it at the time.

Mr. Crockett: No, I have not noticed a winking yet. If I had I would have mentioned it.

The Court: Well, there isn't much that you have missed, but you may just as well go ahead and get it all down and out of your system. I deny that I have ever done anything of the kind. I wouldn't stoop to such a thing, and I do not see how you lawyers have the effrontery to keep saying so.

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—Tr. Tr. 7892—

New York, June 20, 1949

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Mr. Isserman: It is relevant because, if this is an element of the conspiracy and the testimony has been to the effect that these 12 men got together and influenced a convention to adopt a particular resolution, the fact that there was a democratic procedure in the discussion of the resolutions, that amendments were made, that amendments came from various parts of the country, and were considered—

The Court: Amendments were made and you have already proved they were made. I will sustain the objection.

Mr. Isserman: —and that discussion—

The Court: Well, I don't desire to hear any further argument.

Mr. Isserman: I might say this to your Honor—

The Court: I wish you would refrain from further argument.

Mr. Isserman: I would like to say—I would like to answer a question your Honor asked.

Mr. McGohey: I am going to object to any more summation at this time by Mr. Isserman.

The Court: Yes.

Mr. McGohey: That is all he is doing.

—Tr. Tr. 7892a—

Mr. Isserman: Well, I—

The Court: I don't desire any further argument, Mr. Isserman.

Mr. Isserman: Your Honor has ruled on the objection?

The Court: Yes, I sustained the objection.

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—Tr. Tr. 7940—

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Mr. Isserman: Would the Court take judicial notice at this time that the Smith Act, under which this indictment was drawn, was enacted in June 1940?

The Court: Yes. Wasn't it June 28th? I have some recollection it was.

Mr. McGohey: I didn't get the request, your Honor.

The Court: The request was that I take judicial notice that the Smith Act became law in June 1940. I have some recollection the date was June 28th, but it was June 1940.

Mr. McGohey: Yes.

Mr. Isserman: I think it was June 28th, your Honor.

Q. Now was the section—

Mr. McGohey: Just a second, if you please. Will you excuse me for just a minute here, your Honor?

The Court: Yes.

—Tr. Tr. 7941—

Mr. McGohey: Now will your Honor also take judicial notice of the fact that the Alien Deportation Laws were in effect from about 1917, I think?

I can have the date—I will fix that date precisely.

Mr. Sacher: The which laws?

Mr. McGohey: Deportation Laws, and that they have a similar provision about advocacy of the overthrow of the Government by force and violence.

Mr. Sacher: I object to that, your Honor, on the ground that that has nothing to do with the charges in this case.

The Court: Well, I am not quite sure what the point was of Mr. Isserman's asking me to take judicial notice of that but I don't think that argument is going to help it any, and if what Mr. McGohey asks here should not fit into what you have in mind I can't see that the slightest harm will be done.

Mr. Sacher: The only thing is that we have asked you to take judicial notice of a lot of things that were judicially noticeable and Mr. McGohey now makes the same request and it is taken.

The Court: Judicial notice of when laws of the United States take effect is entirely different from judicial notice of certain historical facts and revolutions in the past.

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—Tr. Tr. 7951—

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The Court: Mr. Green, you are hereby remanded for the balance of the trial.

(Defendant Dennis stands.)

The Court: The jury may be excused.

(The jury left the courtroom at 3.50 p.m.)

(Defendant Dennis sits down.)

Mr. Isserman: If the Court please, I ask the Court to reconsider its ruling—

The Court: I will not.

Mr. Isserman: —in remanding Mr. Green.

The Court: These disorderly outbursts—I will not have it. That is all there is to it.

Mr. Isserman: If your Honor please—

The Court: I have tried here throughout this long

—Tr. Tr. 7952—

trial to be just as patient as I could be, and the one thing that I have told you from the beginning I would not tolerate is disorder in any form here. I have given ample warning, and I just will not have it. I would have to abdicate my function as a Judge here if I were to permit these disorderly outbursts to continue every time one of the defendants felt disposed to criticize me, or the Court.

Mr. Isserman: The outburst, if the Court please, was not disorderly. The document—

The Court: I have already warned this witness three or four times.

Mr. Isserman: The document in question is an important document, it is written by the witness, it expresses his own views and expresses his intent in connection with the indictment under which he is charged. I ask the Court to reconsider the Court's action in remanding him and to allow him to remain at liberty during the period of his testimony.

The Court: No, I will not do so.

Defendant Dennis: May I be heard on this, your Honor?

The Court: Yes.

Defendant Dennis: First, I would like to emphasize the exhibit offered in proof—offered in evidence happens to be something which is more than another

—Tr. Tr. 7953—

article, something more than just an expression of opinion on this and another question. This offer of proof contains an article which Mr. Green and I collaborated on, which goes to the heart of the issues and the charges set forth in the indictment, and it explains most clearly our position and the position of other defendants in respect to democracy, democratic liberties, and it is how we can—how we advocate and teach the ways and means to defend existing democratic liberties, to secure democratic advance in the country, and to pave the way for the attainment of a new system of society, Socialism. Therefore, it is—this exhibit is something which is both dear to us and it happens to be an accurate and a clear presentation of our position; and surely, I think, that anyone could understand, and the Court must understand, the feeling of any witness or of any defendant, and particularly that of Mr. Green, who surely understands, appreciates what is at stake in this effort.

In addition to this, your Honor, it seems to me that the—that your Honor's ruling here is entirely unwarranted and without foundation.

The Court: Well, you see, Mr. Dennis, you don't seem to realize that these defendants, including yourself, are in the same position as parties to other

—Tr. Tr. 7954—

litigation. It is essential to the administration of justice that proceedings be conducted in an orderly way. The amount of disorder, the amount of contemptuous behavior that I have witnessed here in this case is beyond anything that I could have thought possible in an American court, and my lenience, if it may be called that, my desire to gradually bring things to a point where there would be an orderly way have, perhaps, been misunderstood. I intend that there shall be no more of that.

Now, it seems to me a curious circumstance that no matter how many times you and your co-defendants and counsel are warned and told not to do things, why, they keep right on doing them. Now, this witness, Green, for example, I have told him a half a dozen times not to have these outbursts but he seems unable to control himself, and what he said here is, to my mind, completely contemptuous and wrong, and I won't have it. Now, I am running this court not the defendants or their lawyers.

Mr. Isserman: I would remind the Court that the witness has sworn to tell the truth and the whole truth, and I think he should be permitted an opportunity, like other witnesses—

The Court: Well, he had better answer the questions when they are put to him. And, you know, this thing has been gone over, and over, and over.

Green—Direct
Colloquy

—T. Tr. 7955—

You will remember what the defendant Davis did one day here. There is very little difference in degree. And I thought then that I would take the occasion to make a very clear warning, which I did. Now, every time that warning is disobeyed and we have some additional disorder, the consequences will follow.

Defendant Dennis: But this action, your Honor, is, in addition to being totally unwarranted—the ruling of the Court—it surely can have no other effect than to obstruct our case, the presentation of our position. It can only divert from the issues which we are bringing out in the court and to hamstring us and place us in a straitjacket.

The Court: The choice was his. You may go ahead using this same kind of language, and I am going to treat you just as I did the other day, as one of the lawyers here, and when you use such expressions as "hamstringing" and other things of that kind, although you are not a lawyer, you have seen things here and listened, you must know that that language is not proper language to address to the Court; but, however that may be, I think we had better let the matter rest as it is and go on unless some of the rest of the lawyers here desire to add something.

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—Tr. Tr. 8219—

New York, June 22, 1949

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Mr. Isserman: I am really puzzled. When I offer it, it is inadmissible, and the three paragraphs, when Mr. McGohey offers it, are admissible. I just don't understand the rule of evidence at all.

The Court: It is a case of the same thing that we talked about the other day and you cannot seem to get that in your head, and I am not going to tell you again.

Mr. Isserman: One thing I can't understand, your Honor, how it is relevant when Mr. McGohey offers it and not relevant when I offered it three minutes before, the same three paragraphs.

The Court: You see, what a defendant says becomes an admission, admissible by the Government, if it has been proved to have been the utterance of the witness, and he has said that it was. Now, you may not like that law but that is the law applicable in all cases, not just in this one.

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—Tr. Tr. 8266—

New York, June 23, 1949

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Mr. Gladstein: Excuse me, Mr. Isserman.

May I ask if the Court will inquire of Mr. McGohey the ground upon which he objects to the statement that is offered in evidence representing—

The Court: If you look at it, Mr. Gladstein, you will see a number of reasons that are very obvious. I do not intend to direct Mr. McGohey to state the basis of his objection.

Mr. Gladstein: I have read the document and I am frank to say since it constitutes the man's own statement on force and violence that I don't see the point of the objection.

The Court: I don't know how I am ever going to get you to stop this argument. There have been so many times I have told you but you go on just the same. Please don't do any further arguing on this. I have ruled on it.

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—Tr. Tr. 8270—

Mr. Gladstein: I understand, but I ask your Honor whether you will permit the witness to read the document.

The Court: You call it the best evidence and I don't want to get into an argument with you about it, but when a man says he prepared a paper that is step No. 1. He says he prepared a paper and then he says he said so and so. Now I am allowing him to give his recollection as refreshed from the paper of what he says he said over the radio that day.

Mr. Gladstein: It would be so much simpler and proper to have him read what he said.

The Court: I get your point. You are doing your little summing up as you do all the time and talking over my shoulder to the jury and it is what you know you should not do.

Mr. Gladstein: I object to that, your Honor.

The Court: Object all you want, but you do it all the time.

Mr. Gladstein: I object to that remark and I ask your Honor to admonish the jury to disregard it.

The Court: I will not admonish the jury.

Mr. Gladstein: I assign that remark as misconduct.

The Court: Very well.

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—Tr. Tr. 8281—

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Q. Now was that draft which you saw subsequently revised? A. It was.

Q. And when was that? A. After the indictment Mr. Foster expanded on the project in order to relate it to the specific aspects of the indictment in this case.

Q. And was the document published? A. It was published.

Mr. Isserman: I would like to have this marked for identification (handing to clerk).

A. (Continuing) And it was approved by the National Board.

(Marked Defendants' Exhibit 7 x O for identification.)

Mr. McGohey: Could we have that time fixed, your Honor?

The Court: Yes.

(To witness) Do you remember when—you say he finished it up after the indictment, that is, after July 20, 1948, and it was approved by the National Board when?

The Witness: Well, your Honor, there was—at each stage there were—there was approval of the general line embodied in it, and then further additions and proposals made. The draft that was finally published was adopted a couple of months ago.

—Tr. Tr. 8282—

The Court: In this year 1949?
The Witness: That's right.

Q. Was it thereafter published, Mr. Green? A. It was.

Mr. Isserman: I have an extra copy if the Court would desire it (handing to the Court).

Q. Mr. Green, I show you 7 x Q for—

Mr. Isserman: Is it Q? Is it Q?
The Clerk: O.
The Court: 7 x O.

Q. I show you 7 x O for identification, and ask you if that is the statement to which you just had reference (handing)? A. It is.

Q. Does that statement contain the matter concerning which you testified? A. It does.

Q. And does it contain a statement of the development of changes in the Communist Party's position from 1935 to the date of the indictment as you understood those changes, as a member and leader of the Communist Party?

Mr. McGohey: Objection.
The Court: Sustained.

A. It does.

Mr. McGohey: Objection, I move to strike it out.
The Court: Strike it out.

—Tr. Tr. 8283—

Q. Does that statement contain the substance of what you taught and advocated as a leader of the Communist Party from the time you—as a member and leader of the Communist Party from the time you became a member until the time of the indictment?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. Isserman: At this time, if the Court please, I offer Defendants' Exhibit 7 x O for identification in evidence without the first page of the exhibit, without the last page, and without the pictures contained therein (handing to Mr. McGohey).
Mr. McGohey: I object to this document which appears in the Daily Worker for May 23, 1949.
The Court: Objection sustained.
Defendant Dennis: If the Court please, I should like to be heard.
The Court: The jury may be excused.

(The jury leave the courtroom at 12:25 p.m.)

The Court: Yes, Mr. Dennis?
Defendant Dennis: With due respect to the Court's ruling, I submit there is no valid basis, legal, moral or otherwise, for excluding Mr. Foster's statement,

which is of crucial importance to the defense of the eleven, the defense of the democratic rights of our

—Tr. Tr. 8284—

Party. I would assume—

The Court: Why, this statement came out when the deposition had been ordered of Foster on written interrogatories and cross-interrogatories, and so on. How can it be that a man can issue an ex parte statement as defense and then have that put in evidence in lieu of testimony?

Defendant Dennis: Well, on that point, your Honor, I think it is clear that the statements of Mr. Foster in a deposition are not mutually exclusive, and at best the deposition would and could only supplement this rounded-out statement, which is not the personal views of Mr. Foster alone but which is now an official party document. It has already been published in over a quarter of a million copies, and it is being used everywhere both by the National Committee and all organizations of our Party as a guide to action for the present situation and for the coming years.

The Court: But the defense is to be given from the witness stand by testimony, not by preparing a paper and circulating it and then producing the paper in court and saying "This is our defense." You can't cross-examine a paper.

Defendant Dennis: It would seem to me on that question, in its more technical aspects, the fact that,

—Tr. Tr. 8285—

let us say, one of the defendants or several or all testify; that by no stretch of the imagination pre-

cludes the submission of additional evidence by a defendant, or any other defense witness, particularly when it is more than an article or a speech, when it is the most comprehensive and most authoritative exposition, both of the theory and the strategy and the tactics of our party, and I would say apropos of this that certainly this statement, which is the most fundamental presentation of our position in all aspects, is a thousand times more relevant than other articles or documents, not only those which have been offered in evidence and which have been offered by Mr. Foster—surely, they are far more relevant in this case than the issues at stake, and let us show the excerpts from the writings of Mr. Foster, written in 1928 and 1932 which the prosecution has offered, and which Mr. Foster as well as our Party have changed their point of view, and in fact with respect to certain of those have repudiated the points of view that were expressed.

The Court: Didn't Mr. Gates testify to that effect?

Defendant Dennis: That was with respect to a certain part.

The Court: Yes.

Defendant Dennis: I would like to emphasize

—Tr. Tr. 8286—

to the Court that Mr. Foster's statement herein presented deals in a rounded-out way with basic questions concerning both our immediate program as well as our ultimate program. This statement—

The Court: We have to try this case, Mr. Dennis, according to the rules of law, and I know of no

precedent whatever for permitting any such thing as this to be done.

Defendant Dennis: But it seems to me amongst the questions raised in the case that deal with the position of our Party on such matters as referred to in the indictment, the questions of whether our Party advocates peaceful or violent means of obtaining its fundamental objectives, et cetera, therefore it seems to me it is germane, it is absolutely relevant that we should be allowed to present the official position of our Party; and in regards to the question that may be raised as to when the document was finally published and finally circulated, I would call to the attention of the Court that the important thing is not when a statement or document or a book may have been written; the decisive thing is, does it represent authoritatively the real, the actual position of our organization, and I submit—

The Court: Well, I think one difficulty, Mr. Dennis, that has pervaded this entire case is that you and your co-defendants and your lawyers have seemed

—Tr. Tr. 8287—

to have a queer notion that when they say something is so that makes it so, and I don't know where you ever get that idea, but it just—there is no basis for it. The jury will do the deciding, passing on credibility of witnesses and drawing inferences from facts. And just because you say something is so simply does not make it so, and you have to reconcile yourself to that.

Defendant Dennis: Well, your Honor, the statement I make regarding Mr. Foster's statement is authentic, is accurate. Mr. Foster's statement embodies most profoundly and in a most comprehensive and rounded-out way the position of our Party. It deals with matters of strategy and theory and tactics, and among its unique contributions is that it analyzes the changes and positions in the Party's policies over the years, and particularly since 1935; and I would remind the Court that in the cross-examination of Mr. Gates the Government introduced a review which appeared in the Daily Worker after the indictment, a book review of Mr. Vishinsky's book, and the Government offered both the review and Mr. Vishinsky's book in evidence, and here—

The Court: Did I receive Mr. Vishinsky's book? What is the exhibit number?

Mr. McGohey: You didn't, your Honor; I can answer that.

—Tr. Tr. 8288—

Defendant Dennis: But the Court ruled on quite different grounds.

The Court: Well, you mean they tried to get it in but I wouldn't receive it. Well, that doesn't make much of an argument then.

Mr. McGohey: If the Court please, the Vishinsky book was not offered. It was marked in evidence and the witness Gates was examined concerning it.

Mr. Gordon: Marked for identification.

Mr. McGohey: Marked for identification, but it wasn't even offered.

The Court: Yes, that is my recollection. I have no recollection of receiving that book, but however that may be, Mr. Dennis, I really am not open to argument on this. It is a most unprecedented thing. It is contrary to any rule of law that guides us in these cases, and it would make it possible for a defendant, instead of taking the stand and subjecting himself to cross-examination, to get up a big book explaining everything the best he could, putting it all down and putting the book in—and you can't do that.

Defendant Dennis: But the important thing here, your Honor, as I said, is not when this particular statement or another book or document may have been written; the question is, does it accurately rep-

—Tr. Tr. 8288-A—

resent the position of our Party on this, that or some other question; and this particular statement is the most rounded-out and programmatic exposition of our stand.

—Tr. Tr. 8289—

The Court: And it has been most carefully prepared after the indictment, everything was worked out, that was all done after the indictment, and naturally you would expect people who were sitting down and preparing a document to explain everything as best they could, and if you could do that instead of taking the witness stand and being cross-examined, why, we would have to revise our whole system of the administration of justice.

Defendant Dennis: Your Honor, that was prepared with great care and thoroughness and deep

insight and with all the profound contributions of which Mr. Foster as our National Chairman is capable. In connection with other documents which we present they were also prepared carefully and thoroughly, even some of the ones that have been excluded so far. The care and thoroughness of the preparation cannot militate against the introduction of this evidence which I repeat is indispensable for the defense of us 11 defendants.

The Court: Don't you think we ought to get the jury back? You don't need to argue, do you, Mr. Gladstein?

Mr. Gladstein: I would like to support the argument briefly by answering a couple of questions the Court has posed.

The Court: I find every time that we get into

—Tr. Tr. 8290—

one of these things an hour or two goes by. I suppose it is my tolerance of this sort of thing that encourages it. The paper that is being offered is clearly the most inadmissible piece of evidence I have ever seen.

Mr. Gladstein: Can I address myself to that one point?

The Court: If you can do it briefly, but I suppose the minute you get through Mr. Isserman will have to speak and Mr. Crockett.

Mr. Crockett and Mr. Isserman, are you willing to let Mr. Gladstein finish the argument on this?

Mr. Crockett: If your Honor desires to hear me I would be very glad to speak.

The Court: All right, tell the jury to go to lunch.

Mr. Isserman: I was going to tell the Court I was not going to speak.

The Court: That is all right, tell the jury to come back after lunch.

Go ahead.

Mr. Gladstein: Now your Honor has said that if this exhibit were received it would be unprecedented. Now first of all I think that that wouldn't be an obstacle because a number of unprecedented things have already occurred commencing with the returning of the indictment.

—Tr. Tr. 8291—

The Court: Ha ha, you know I expected you were going to do that.

Mr. Gladstein: I can't overlook the opportunity nor the necessity to reply to your Honor.

The Court: All right.

Mr. Gladstein: This is an unprecedented case. It presents unprecedented issues. It has been handled in an unprecedented way.

The Court: I'll say it has.

Mr. Gladstein: And early today we had occasion to complain of at least one aspect of the case in which the Government joined in conceding that that aspect was handled in an unprecedented way. But be that as it may, I do not think that this is unprecedented by any means: what we are asking the Court to do, and I submit that we are actually asking the Court to apply a very well recognized rule of law, is this: there are two questions that might be raised concerning this document. One is is the ma-

terial contained in the document material to the issues in the case?

To that there can be no question as to what the answer is going to be because the document contains the official advocacy of the defendants and of the Communist Party referring to the very issues involved in this case, such as issues, for example, as

—Tr. Tr. 8292—

to whether or not the defendants have advocated the forceful overthrow of the Government.

The Court: You wouldn't expect them to issue a booklet in which they said, "We are guilty"?

Mr. Gladstein: I am coming to that. I first want to point out that the subjects treated in the document are definitely material, they deal with force and violence, they deal with such subjects as the dictatorship of the proletariat, they deal with the Communist analysis of the capitalist system of society, they deal with depression, with fascism and with war.

These are the subjects the Government has put witnesses on who in substance according to their claim say that the Communists advocate force and violence against the Government and that this force and violence would be used either in a depression or crisis or in a time of war.

Therefore on the first aspect, on materiality, I think there can be no question that the document is material.

Now, secondly, does it give fair opportunity to cross-examine? Does it overcome the question that your Honor asks, What would we expect them to do? Plead guilty?

The Court: If they were going to plead guilty

—Tr. Tr. 8293—

they would plead guilty. They wouldn't need to issue a book saying that.

Mr. Gladstein: Yes, and this is my answer: The document offered does not purport to represent solely and exclusively what the leaders of the Communist Party today say they advocate. The foundation has been laid by the testimony of this witness to establish as a fact that this document is an historical document, it is a document which brings together in one place and synthesizes, compiles and summarizes the teachings, the advocacies, the doctrines, and the activities of the defendants during the period covered by the indictment, 1945 to 1948, as well as a period prior to 1945 which I take it would not be ruled out since we have had Government witnesses go into background even beyond 1935 and into 1930.

So it is an historical document which has every bit as much place, and indeed far more place than the History of the Communist Party of the Soviet Union or the Communist Manifesto.

The Court: You don't call this legal argument, do you?

Mr. Gladstein: I do, your Honor.

The Court: I sounds to me like arguing to some people who did not know any law.

—Tr. Tr. 8294—

Mr. Gladstein: Of course lawyers have that experience themselves. They try to set forth good, sound legal propositions.

Let me say therefore this document, which is supported by and documented by the actual historic activities and advocacies of the defendants—

The Court: That is what you say.

Mr. Gladstein: But we have a right at least to present and let the jury pass upon whether it is or not.

The Court: The jury is not going to pass on some book that you say is the truth. That settles it. The truth will come from the witness stand and they will pass on the testimony of the various witnesses—

Mr. Gladstein: That brings me to my next point. This witness testified that he participated in the preparation of the exhibit which is now being offered and he is prepared to testify to the accuracy of what is reflected by that document of his views, opinions, teachings and advocacy subject to cross-examination. If this document were admitted in evidence it would then enable Mr. McGohey to cross-examine Mr. Green on every—

The Court: Let me ask you this: Suppose you had a contract case and the plaintiff takes the stand —Tr. Tr. 8295— his counsel asks him, You have studied all the aspects of this question? He answers, Oh yes.

Did you write them all down?

I have. I have been studying this for a couple of months and I have got down in this little book every detail carefully worked out and that is just absolutely right.

And the lawyer says, You sure you got everything right?

He says, Positively, so and so, and so and so.

The lawyer offers it in evidence and you say then they can cross-examine him and you say that is all right?

Mr. Gladstein: They can cross-examine the author much easier than they can cross-examine Karl Marx or Joseph Stalin. When the Government offered the Communist Manifesto and the Foundations of Leninism into evidence you received those documents.

The Court: They were teaching those things in the schools.

Mr. Gladstein: And the testimony here by this witness is that the document that we are now offering in evidence represents in one handy compiled place a summary of his own teachings which contain the historical changes in his own ideas, in his own

—Tr. Tr. 8296—

advocacies during the period covered by this document, and he is fully subject to cross-examination as to any and every part of it; whereas we when the Government put in evidence such things as the Communist Manifesto, Foundations of Leninism and things of that kind are left with no opportunity to cross-examine.

The Court: Now, why don't you let Mr. Crockett have his turn? Then Mr. McGohey may want to say something, and I do want to finish up by one o'clock, and then we can have the jury back.

Mr. Gladstein: And may I say just one thing more? This very exhibit, your Honor, was, I am informed, received in evidence yesterday—a quotation received—and I am prepared to state that that

was a proceeding in which the United States is seeking to deport an alien whose name is George Perinsky. It was offered in evidence on behalf of and in defense of the alien, who was there charged with having belonged to an organization which advocated, so it was claimed, the overthrow of the Government by force and violence, and it was alleged that that party was the Communist Party. My understanding—my information is that at first the Government took a position of objecting to the document, but subsequently either the Government withdrew that objection or the presiding inspector, I think that is the

—Tr. Tr. 8297—

title that is used in those proceedings now, ruled that the document was admissible on behalf of the alien, and I respectfully refer your Honor to that ruling in connection with this very same exhibit.

The Court: All right. Now let's hear from Mr. Crockett.

Mr. Crockett: I really don't wish to enlarge on the arguments given by Mr. Gladstein. I think they have sufficiently covered the legal point. I merely want to repeat and emphasize something that I have said to the Court on several prior occasions, and this is in its nature a political trial, the first one that we have had in the United States. When we look for precedents, we don't find precedents. This is a case in which we have to make the precedents as we go along. The fact, therefore, that a document such as this in the ordinary criminal case may or not be received in evidence, I submit, is not a precedent. It certainly was not a precedent on the part of the Gov-

ernment when they had the Vishinsky book, which came out, as I recall, subsequent to the date of this indictment, and the review of that book, which was published in the Daily Worker long after the date of the indictment actually marked in evidence here, and the only reason that I could see why it was not offered

—Tr. Tr. 8298—

or received in evidence was because the witness who was on the stand said that he had not read the book.

Now, if it is not unusual for the Government to do something like that, and the Government, I submit, should be an example for all of us, then obviously there is nothing unusual in our offering a document that was begun long prior to the indictment, but the final draft of which came out after the date of the indictment.

I submit, your Honor, that this being as it is, a political trial, we cannot be hide-bound by the existence or non-existence of past legal precedents, and we should decide these issues on the basis of the merits and the justice of what is being tried to be done and, on that basis, make our determination that this document should be received in evidence.

The Court: Do you desire to say anything, Mr. McGohey?

Mr. McGohey: Your Honor, very briefly, I think in view of the long argument and the statements which purport to be statements of fact that have been made in these arguments which your Honor has just heard that it would be appropriate to point out and put in the record the basis, at least, upon which

the Government has based its objection to the introduction of this proferred exhibit.

—Tr. Tr. 8299—

I object, first of all, because, upon its face, and I call your Honor's attention to the first page of the paper in which the exhibit appears—now, it is true that that first page with the picture, I think, was excluded from the offer, there was something said about it, but when your Honor is considering it, you cannot fail to take cognizance of the fact that the first page of this paper says, "In Defense of the Communist Party and the Indicted Leaders." So it is clearly a self-serving declaration and I say, your Honor, that on its face it shows that it is a piece of manufactured evidence by a co-conspirator, published after the close of the Government's case, which occurred upon May 19, 1949, and after an order was issued by this Court directing Mr. Bigelow, as Commissioner, to take the depositions. That order was signed on the 17th. And I point out furthermore, your Honor, that this statement, which is said to consist of 27,000 words, was made at a time when there had been, as there is now, repeated representations to your Honor and to this Court that the man who purports to have made this statement was so sick that he couldn't even have the depositions taken in his own home at the time he chose himself.

Now, you have just had argued to you something

—Tr. Tr. 8300—

which has been argued and commented upon in the Circuit Court and that is, that in some manner there ought to be a whole new set of special rules for the

handling of this case; in other words, in 1949, you are now being asked to throw out the window the rules of evidence that have been developed in the centuries of Anglo-American law as, indeed, the Circuit Court was asked to make special rules and to acknowledge that there ought to be special rules for the treatment of those defendants whom your Honor held in contempt or whom your Honor remanded for the violence of their action in the courtroom.

I suggest to your Honor that there is no basis for this argument that there ought to be special rules; and under the rules of evidence as we understand them, there is no possible basis for this specious argument of Mr. Gladstein, that by some process of representation, because Mr. Green is on the stand, that, therefore, we can in some vicarious manner examine the man who purports to have made this document.

I object to it and I insist that your Honor is right, that there is no basis for that, and that its admission would violate every elemental rule of evidence in our law.

Mr. Gladstein: May I say one word?

—Tr. Tr. 8301—

The Court: If you ever did that, Mr. Gladstein, I think I would drop dead.

Mr. Gladstein: When I say one word, I mean it in a lawyer's sense.

The Court: All right.

Mr. Gladstein: But I want to say this very briefly.

The Court: All right.

Mr. Gladstein: I want to record my objection to a statement that Mr. McGohey made. I am not going to undertake to reply to him because I think it would be useless, not because I do not think merit is on our side but I just don't think that that merit is going to be recognized, but I challenge Mr. McGohey to withdraw his objection and undertake to prove, if he can, that the exhibit representing this witness's and Mr. Foster's and other defendants' ideas and their advocacies over the past years, I challenge Mr. McGohey to prove that it is a piece of manufactured evidence. And if he doesn't want to accept that challenge, then I ask him in good grace, as an officer of the court which he is so fond to remind people of from time to time, that he withdraw that wholly unprofessional charge that he made.

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—Tr. Tr. 8708—

New York, June 29, 1949

The Court: Well, you accuse me of being an old tyrant and everything under the sun, accuse me of judicial misconduct of various kinds, and I take that in good temper, and you speak about not having a chance to prove your case. You have had ample chance to prove your case and anybody who reads this record can see that you have had. So there is no need of your saying how I cut you out and how I won't take the necessary time. I am going to take the necessary time but I am going to be the one to decide what is necessary.

Mr. Isserman: I must respectfully except.

The Court: That is all right. I suppose that is prejudicial misconduct from your point of view but I intend to give you the necessary time, but I am going to do the deciding as to what time is necessary. The exhibit may be marked in evidence.

Mr. Isserman: May I ask if the Court's instruction with regard to the Negro question is a ruling or only a suggestion?

The Court: I am ruling on matters as they come before me for ruling. As to this particular matter it seems to me that there is no occasion to go into this lynching business. You have rubbed that in again and again and again. We have had lynching and lynching and lynching and Jim Crow and Jim Crow. I say we have had enough.

Mr. Sacher: If we have had enough, it ought to

—Tr. Tr. 8709—

be stopped in the United States of America. So long as it exists, your Honor, it is appropriate to bring it before the Court. I want to say on behalf of the clients I represent that I shall not regard myself as being precluded from laying before the Court and jury all the oppressions—

The Court: That is not what this case is about.

Mr. Sacher: But it happens, and I am sure we can demonstrate to your Honor, that that is precisely what this case is about.

The Court: I don't see how anybody can think that this case has anything to do with whether or not lynching can be stopped.

Mr. Isserman: I want to show that lynching has a relation to this indictment.

The Court: I say you have done it. I say you have done it ad nauseum. You have done it again and again and again. To claim that anybody on this jury or I does not understand the position that you and your colleagues have on that subject is to assume that we are all stupid.

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—Tr. Tr. 8895—

New York, June 30, 1949

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Q. So when you said you did not speak it and you did not read it, it was false in this application, Government's Exhibit 166? A. I have already told you, Mr. McGohey, that the facts in that application are false. I needed a job, I had been deprived of it for political reasons, and I told you that my name is wrong there and the information is wrong there.

Q. Well, the specific question is, did you or did you not answer truthfully or falsely when you said you did not speak any foreign language and when you said you did not read any foreign language? Was that true or false?

Mr. Isserman: The question has been answered and this is repetitious.

The Court: I will allow it.

Mr. Isserman: And I object to it.

The Court: Overruled.

Mr. Sacher: I would like to quote the Court and say "This is pretty small pickings."

The Court: That is just one more mark against you, Mr. Sacher. You would not dare do that but for what I have said as to this trial, and you may live to regret it.

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—Tr. Tr. 8937—

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Q. Isn't it a fact, Mr. Green, that you went abroad in 1932 and in 1933, and in 1934, and 1935, and 1936, and 1938? A. It may be a fact.

Q. Is it a fact? A. Well, I don't recall each one of those years that you mentioned, but I have said that I made a number of trips abroad.

The Court: Mr. Reporter, let me have those dates.

(Record read.)

Mr. Gladstein: If your Honor please, I move to strike out the questions and answers dealing with this subject, and I now interpose an objection based

—Tr. Tr. 8938—

on the incompetency, irrelevancy and immateriality of this line of questions, and I assert moreover that it is perfectly clear that the United States Attorney is pursuing this subject for no other purpose than to seek to introduce something prejudicial against this witness, and not for any purpose legitimately within the confines of proper cross-examination.

The Court: You know, Mr. Gladstein, I have so often said that I desire no argument—

Mr. Gladstein: Very well, I shall not pursue it.

The Court: I notice that you never pay the slightest attention to it. You get up again and again and you argue knowing that I have stated if it is desired to present argument that you should seek permission. I take it that your simply neglecting that all the time is deliberate.

Mr. Gladstein: No, your Honor, I didn't neglect it and I didn't intend it, but I felt a little tardy in making my objection and I rose to tell you why I made a motion to strike and ask your Honor to consider my objection.

The Court: Yes. Your motion is denied.

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—Tr. Tr. 9145—

New York, July 6, 1949

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Q. Mr. Green, I desire to read to you some testimony by Mr. Gates: "Q."—

Mr. Gladstein: What is the page, please?

Mr. McGohey: 7469.

—Tr. Tr. 9146—

Q. "Was the book 'Toward Soviet America' taught or advocated by the Communist Party at any time as part of its teaching or advocacy?"

And then after some colloquy, the answer:

"So far as I know it never was.

"Q. It never was what, Mr. Gates? A. It never was adopted or approved by the National Committee or the National Board or Political Committee or National Convention of the Communist Party."

And then the Court says:

"But let me just ask him a question.

"I take it you mean by that at no time to your knowledge was that book part of the doctrine that was taught and advocated by the Communist Party?

"The Witness: That is correct."

Do you recall that testimony by Mr. Gates? A. I recall it.

Q. Now, as a matter of fact, weren't there occasions when "Toward Soviet America" was recommended by the Communist Party or its leadership? A. I have no recollection of that.

The Court: Is that that book of Foster's?

Mr. McGohey: Yes.

Mr. Gladstein: May I point out—I object to that question. It is not related to the portion read from

—Tr. Tr. 9147—

the transcript. The portion read from the transcript dealt with whether or not that book constituted part of the advocacy and teaching. That is quite different from asking whether or not anybody in the Communist Party recommended that that book be read.

That was Mr. McGohey's last question, I think—it asked whether the book was recommended.

The Court: You know, Mr. Gladstein, since you have been back here you have, on every single occasion that you have arisen—you have wholly disregarded my direction that there be no argument or discussion without asking my leave to do so, and the effect of your interposition and your comments is evident in the record here. A good part of every day is spent in the same sort of wrangling that I have tried to eliminate.

Now I should think that after I have spoken to you so many times about it that you would realize that pretty soon I am going to have to find that you do it deliberately.

You remember the last time I asked you whether you did it deliberately, you said, "Oh, no," that it was an inadvertence? Do you remember that? Now please try in the future to follow my direction.

Now go ahead, Mr. McGohey.

—Tr. Tr. 9147a—

I will overrule Mr. Gladstein's objection.

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—Tr. Tr. 9597—

New York, July 12, 1949

Mr. Sacher: If it please the Court, I now offer Exhibits 9-B for identification and 9 x C for identification in evidence.

Mr. McGohey: Both of them?

Mr. Sacher: Yes. We will only read it once, though.

Mr. McGohey: Object to both of them.

The Court: Sustained.

Mr. Sacher: I should like an opportunity to be heard on this, your Honor, because I think—

The Court: No, I don't want to hear any argument on that. It seems perfectly clear to me.

Mr. Sacher: You mean—

The Court: I don't want to have happen again what happened when that paper that was prepared by Mr. Foster was offered.

Mr. Sacher: But, your Honor, this was approved by the Communist Party.

The Court: I know. I don't want any argument on it, Mr. Sacher.

Mr. Sacher: Not only that but—

The Court: Please do what other lawyers do when the Court has ruled.

Mr. Sacher: Well, this man has to defend himself. This is why he was a Communist and I think that—

—Tr. Tr. 9598—

The Court: Please don't become offensive, Mr. Sacher. I understand he has a right to defend himself. I am giving him every opportunity under the rules of law to defend himself, and this insinuation of yours, that I am doing something different, is very offensive to me, and I hope you won't repeat it.

Mr. Sacher: But it is incomprehensible to me that a document written at the instance—

The Court: That may be because you read so much of this material here that you got queer no-

tions, I don't know, but however that may be, I rule it out.

Mr. Sacher: Would it be permissible to excuse the jury and permit me to—

The Court: I don't desire any argument on this. I don't see any necessity. It seems perfectly clear to me.

Mr. Sacher: Will your Honor give me an opportunity to go over this exhibit during the recess, to offer individual sections of it, if I may?

The Court: I will give you the opportunity to do that. It seems to me offhand that the objection goes right to the root of the whole matter.

You have an impression that what a person may write and then have some resolution issued, that necessarily that makes it admissible, and I cannot

—Tr. Tr. 9599—

see that, but you may go over it and you may offer such portions as you desire and I will give them consideration.

Mr. Sacher: The only thought I have, your Honor, is that when a man has written under these auspices—

The Court: I don't want any argument, Mr. Sacher. If you will, please make a special effort to desist.

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—Tr. Tr. 9632—

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A. Well, I'll say that to the best of my recollection that this isn't in the record,—

Q. Very well. A. (Continuing) That the Judge called me nigger, but he did call me nigger and he called my people niggers.

Q. But you didn't put that in that record when you prepared it, did you, Mr. Davis? A. I couldn't—

Mr. Sacher: Just a moment. I object to the question on the ground that it assumes that Mr. Davis could put it in the record if he wanted it there.

Mr. McGohey: And I object, your Honor, to this—

The Court: You know, Mr. Sacher, you are certainly a problem. Now, you have no right to make any such statement. You must know as a lawyer that it is absolutely not so. A lawyer has a right to propose as the record what he claims the record is.

Mr. Sacher: But this is not a proposal. This is the ultimate record, your Honor.

The Court: Well, I know. I think if you will leave out those comments, it will be better.

Mr. Sacher: Well, I stated the grounds of objection.

—Tr. Tr. 9633—

The Court: This particular one seemed to me especially misleading. A lawyer has a right to propose the record as he claims the record accurately should be. Evidently that was not done here.

Mr. Sacher: But, if it please the Court, that statement I do not think is, at this juncture, warranted, but whenever Mr. McGohey can give the impression—

The Court: You know, I told you some time ago I wasn't going to let you get away with a thing, and I am not. Just keep that in mind.

Mr. Sacher: All I want to do is to protect the rights of my client.

The Court: I understand.

Mr. Sacher: Beyond that I want nothing more.

The Court: You would protect him a lot better if you would leave out this misleading statement.

Mr. Sacher: I object to that. I have made no misleading statement.

The Court: Well, you did make a misleading statement.

Now I state the fact to be that a lawyer, when he proposes a record, may put in there what he thinks accurately and truly should go there.

Now did you do that, Mr. Davis?

—Tr. Tr. 9634—

The Witness: I can't recall.

The Court: All right.

The Witness: That was my first trial case. I made many mistakes in it and it is quite possible that I did not take advantage of every legal recourse that I had, but it was my first trial case, as I recall, and I am pretty sure that I made many errors, but what I was trying to do was basically sound, and so I don't say at all that I got that into the record but I tried in the way I knew how to get it in.

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—Tr. Tr. 9691—

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Q. Will you please explain your answer?

Davis—Redirect
Colloquy

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you believe that the violation of segregation laws would be regarded an offense by the Motor Vehicle Bureau in the City of New York?

Mr. McGohey: Objection.

The Court: Sustained.

He is supposed to answer the questions truthfully.

Mr. Sacher: Well, in view of your Honor's observation then I ask that the witness be given an opportunity to state whether at the time that he signed this great serious document, the application for an automobile license,—

The Court: You can't belittle it that way.

Mr. Sacher: No, it is a great serious document.

The Court: I see you do that all the time.

Mr. Sacher: I wish to apologize. I have a proper regard for motor vehicle licenses.

The Court: It would be better if you do less of

—Tr. Tr. 9692—

that.

Mr. Sacher: In light of your Honor's observation I ought to be able to elicit the attitude of this witness at the time of this application some 20 years after that event in regard to the offense of violating the segregation laws of Georgia. That is all I wish to have so that the jury may see what his state of mind was.

The Court: I thought he didn't even remember putting it down.

Mr. Sacher: That is not what he was asked.

The Court: He was asked whether he said that and he answered it that way.

Mr. Sacher: I don't remember at the moment.

The Court: That is what I thought I heard him say a little while ago.

Mr. Sacher: He wasn't asked that; he was asked whether the signature on this photostat was his signature and he confessed to inability to recognize it on the photostat. But this specific question was not asked of him.

The Court: I sustain the objection.

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—Tr. Tr. 9875—

New York, July 14, 1949

Q. Miss Hartman, did you send this letter (handing)? A. I gave it to club leaders to send out or to give to people to the club.

Q. And was this subsequent to the time that the witness Philbrick came in and inquired, I think, according to your testimony, when you would get started?

Mr. McGohey: Objection, your Honor. That is exactly what your Honor ruled out, and I ask that your Honor direct Mr. Crockett not to include in the question matters which your Honor has ruled out.

The Court: Well, you know, it happens so much here I get sort of used to it. I think we have got an

intelligent jury here and they are just not going to pay any attention to that.

I will sustain the objection.

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—Tr. Tr. 10,036—

New York, July 19, 1949

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Mr. Crockett: Yes, your Honor. Confusion stems from the fact that he testified to about two meetings held in the month of February—is that right, Mr. McGohey, February 1948?

The Court: But on the very page—

Mr. Crockett: The one on 2838 refers to a meeting at the home of a person named Peg.

The Court: Yes, but you referred to page 2839, and I put it right down because I keep careful track of what is going on.

—Tr. Tr. 10,037—

Mr. Crockett: And then Mr. McGohey—perhaps your Honor did not hear him—calls my attention that Peg's name is on page 2838.

The Court: Well the fact is that the first page you mentioned yourself, page 2839.

Mr. Crockett: That is correct.

The Court: And on that page 2839 there is a reference to precisely what I said, which you seem to deny, namely, that it had to do with a meeting in February 1948 at Martha's apartment where Martha led the meeting.

Mr. Crockett: I said in February 1948—

The Court: I do not quite understand why you said "No" when I mentioned that.

Mr. Crockett: Well, we won't argue about that.

The Court: Well, it appears that my notes were correct, and that is the instance you are directing the attention of the witness to.

Mr. Crockett: And directing the attention of the witness to this series of meetings in which Martha figured, according to Philbrick's testimony.

The Court: Well, I think the important thing is to find out if there was a meeting referred to by Mr. Philbrick at which this witness was present, and then we can go on from there. I thought that is what you were doing.

—Tr. Tr. 10,038—

Mr. Crockett: Well, suppose I leave that for the present until I get the particular page.

The Court: Well, that sounds crazy. You always seem to do that. The minute we begin to clear something up someone says "Let us drop it and go to something different."

Mr. Crockett: Well, I have no objection; I will go right on. I am dealing with Martha who figured in Philbrick's testimony, and I think later on he identified her as being a Martha Fletcher who lived on Beacon Hill in Boston.

The Court: Well—

Mr. Crockett: And at page 3185—

The Court: Well, if you desire to drop the

subject and turn to something else I certainly will not prevent you from doing that, so I will not stop you.

Mr. Gladstein: I didn't hear your Honor's remark. Did your Honor use the word "crazy"?

The Court: I thought it was kind of crazy, to begin to go into a subject and then drop it. I think that was kind of amazing. Maybe you could use a little different word.

Mr. Gladstein: I think your Honor's remarks are quite objectionable.

The Court: Well, every time you get back to court

—Tr. Tr. 10,039—

you find something objectionable, you proceed to object, and that is perfectly all right.

Mr. Gladstein: Because every time I get back to court your Honor makes objectionable remarks.

The Court: I will repeat, Mr. Gladstein, for your personal benefit, that this constant business which we have, which for the last few weeks, fortunately, in your absence, has been missing, of getting into something and then the minute you begin to get somewhere with it drop it and go to something else, I have always thought it was a little curious, and I used the word "crazy" not to indicate absolute insanity but something curious and out of the ordinary. So now let us leave that issue and get on to work.

Mr. Gladstein: Not until the record shows I make my objection to the Court's remarks and the explanation thereof still does not take away the effect of

these remarks which are improper. I think they constitute misconduct.

The Court: Well, you mean judicial misconduct?

Mr. Gladstein: Oh, of course.

The Court: That is what I thought. Your objection is noted.

Mr. Gladstein: All of my statements in the course of this trial, when I had asked the Court to assign

—Tr. Tr. 10,040—

remarks it has made as misconduct were intended—

The Court: Well, I suppose I should realize that you are talking back, and I suppose it better if I remain quiet. You are just trying to bait me on to some kind of remark and I should have realized it in the beginning, so please sit down and let us get on to something else.

Mr. Gladstein: I do so but let the record show that the last remarks that the Court makes are misconduct.

The Court: Yes.

Mr. Gladstein: And I ask your Honor to admonish the jury to disregard it.

The Court: I do.

Ladies and gentlemen of the jury, disregard this little passage here. It has no significance whatsoever, no bearing on the case, and put it out of your minds.

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—Tr. Tr. 10,061—

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Q. Do you have with you your discharge certificate or

photostatic copy of the same? A. I do.

Q. May I see it?

(The witness hands to Mr. Crockett.)

Mr. Crockett: If the Court please, I should like to offer this in evidence with permission to withdraw it after reading pertinent portions of it to the jury.

Mr. Mr. McGohey: I object to it.

The Court: You mean you object to his withdrawing it after it is read?

Mr. McGohey: I object to the introduction of it as an exhibit in this case. I think the question of whether this witness was discharged from the Army is of no materiality whatever.

Mr. Crockett: I haven't asked the witness whether he has been discharged from the Army, Mr. McGohey.

Mr. McGohey: Whatever the purpose was the paper indicating his discharge in my opinion is neither relevant nor material to the issues in this case. I object to it.

Mr. Crockett: May I be heard on that?

The Court: Yes.

Mr. Crockett: The witness has testified that he was out of the country during the period concerning which there has been testimony by the witness Philbrick.

—Tr. Tr. 10,062—

Mr. McGohey: Now there we go back again. Now there is no statement that the witness Philbrick has testified to this period, this 1946 period, and again

I call your Honor's attention to the record. He did not testify—

Mr. Gladstein: If your Honor please,—

The Court: Mr. Crockett,—oh, now we have Mr. Gladstein. The jury is excused.

Mr. Gladstein: I think Mr. McGohey ought not to make references of that kind when he knows the exhibit talks about Negro History Week.

Mr. McGohey: There we go again.

The Court: The jury is excused, Mr. Gladstein.

Mr. McGohey: You have no right to do that. You know, it is not in the record.

The Court: Just a moment. Let the jury go out.

Mr. Gladstein: Mr. McGohey and your Honor are both shouting at me at the same time.

Mr. McGohey: Your Honor, there hasn't been any shouting. If there has been any it was by our friend.

The Court: If I did any shouting I am certainly not conscious of it, my goodness. But Mr. Gladstein will always state the facts in his own inimitable fashion. He has been wrong so often I suppose one more time won't hurt.

—Tr. Tr. 10,063—

(The jury left the courtroom and the following occurred:)

The Court: What is it that provoked you so, Mr. Gladstein?

Mr. Gladstein: The first thing is your Honor's last remark that I have been wrong in my statement of facts so often and here is another occasion.

The Court: Would you like me to enumerate them?

Mr. Gladstein: I will accept your Honor's ruling on it made heretofore on the basis of the determination here now.

My objection was to what Mr. McGohey was saying before the jury that he was seeking to give and did try to give the impression that Mr. Crockett was trying to create out of whole cloth the proposition that Philbrick lied when he said that he had worked for or prepared with this witness a certain leaflet.

The Court: But as you not only tried but deliberately did make the statement that the exhibit which has not been received in evidence contained the numerals 1946. I heard that myself.

Mr. Gladstein: I made that statement and it is a true statement.

The Court: The rule of law for attorneys to abide by is not to tell the jury things in exhibits that are

—Tr. Tr. 10,064—

excluded from evidence. You seem to feel that you are not bound by the ordinary rules of evidence.

Mr. Gladstein: I don't see how your Honor can say that. I rose to ask the Court to instruct Mr. McGohey to submit to the ordinary rules of evidence.

The Court: And you felt the way to do it was to take the law in your own hands and tell the jury what was in it.

Mr. Gladstein: I thought your Honor was excusing the jury to permit me to state my point and

now as I started to state it I have had three or four interruptions by the Court.

The Court: You seem to feel interruptions by the Court are illegal and wrong and when you and your colleagues are in a case you are to do all the talking and I am to remain silent. I haven't the remotest intention of doing that.

Mr. Gladstein: No, no, and I didn't have the remotest conceivable idea of doing that. Just as we are bound by the rulings of the Court not to refer to the contents of an excluded or not yet admitted exhibit as a fact, so it is the duty of Mr. McGohey not to make speeches which give the impression that something is not contained in the document that we by obvious implication have been claiming is contained in it. In other words, the rule works both

—Tr Tr. 10,064-A—

ways. If we cannot speak as to what is in the document neither can Mr. McGohey attempt to imply that something is not in the document that is there.

—Tr. Tr. 10,065—

The Court: That is what I don't think he did.

Mr. Gladstein: I think he did and I think the record clearly supports that not only by what he did but the manner in which he tried to indicate that the time was not there when the document plainly says so. It talks about Negro history week.

The Court: Where does that leave us? As I see it, it leaves us at the point where it is better to go on with the interrogation of the witness with both sides refraining from referring to what is in the document or what is not in the document. Then

when the time comes when it is re-offered, that is one thing. When the time comes when it is offered and rejected, if it is, that is another thing. But all these comments that we have been so free from while you were away, Mr. Gladstein, it seems as though they are starting again; and I really think you will serve your clients best by just having us go along quietly and calmly.

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—Tr. Tr. 10,243—

New York, July 20, 1949

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Q. I will ask you, Mrs. Hood, to tell me by what name Frances Smith was known in the Communist Party in Boston. Do you prefer not to answer that question? A.

—Tr. Tr. 10,244—

She was known as Frances Smith at the time we were speaking.

Q. Is she still a member of the Party?

Mr. Gladstein: I object.

Q. Now?

Mr. Gladstein: I object to that.
The Court: I will allow it.
Mr. Gladstein: As of now?
The Court: Yes, certainly.
Mr. Gladstein: Since the indictment?
The Court: Yes.
Mr. Gladstein: Then the rule has changed.

Hood—Cross
Colloquy

Mr. McGohey: Of course, the rule has not changed. Your Honor knows that.

The Court: We have a witness who herself volunteers that she has observed in some way that the name Frances Smith was on one of the exhibits.

Mr. Gladstein: And it is true. It is.

The Court: That she knew her by a different name than Frances Smith obviously in some way connected with the Communist Party here, and I am going to get to the bottom of it if it is possible to do so.

Mr. Gladstein: Now your Honor, I object to the inferences that flow from that remark about getting to the bottom of it. The witness has said that she

—Tr. Tr. 10,245—

knew a woman by the name Frances Smith.

Mr. McGohey: I object to these trial summations.

Mr. Gladstein: It is not a summation; it is an effort to state the basis of my objection.

The Court: Mr. Gladstein, it is the old story. I told you not to argue, to always seek my leave before you did. When you are away we get along very nicely and the minute you are back we get into these things. I think we can bear it patiently and no great harm is done.

What is it you wish to argue?

Mr. Gladstein: Only this: the witness has not said anything that refers to the present moment in terms of name, the present married name. She has testified that she knew somebody named Frances Smith; that that person married, at some date which is not clear;

and I think it is no secret that when a woman gets married she usually changes her name to her husband's name.

The Court: I think it is evident that the witness tried to give the impression that that is all there is to it and I want to get to the bottom of it.

Mr. Crockett: I want to register an objection to the remark that the witness tried to give the impression that that is all there is to it.

The Court: It is all in the record.

—Tr. Tr. 10,246—

Mr. Crockett: My objection goes to the insinuation that the witness was not telling the truth, which unfortunately does not go on the record.

The Court: Insinuation?

Mr. Crockett: Insinuation that the witness is not telling the truth.

The Court: I don't see how you can draw anything like that from what I said. Simply listening to her testimony, I got the distinct impression myself that the witness was trying to say in effect that this woman had a maiden name and a married name and that is all there is to it.

Mr. Crockett: She didn't say that in effect; she said that.

The Court: If I say she said it and you say she said it and Mr. Gladstein says she said it, what is there left to argue about?

Mr. Crockett: Then you add that you are trying to get to the bottom of this to give the impression that somebody is lying, and I submit with all due respect that that is an improper remark.

Hood—Cross
Colloquy

The Court: You are the ones, you with Mr. Gladstein, who are obstructing the cross-examination. Naturally, in response to your questions which seek to cut off further questions on the subject, I say let's

—Tr. Tr. 10,247—

get to the bottom of it. What is there wrong about that?

Mr. Gladstein: Well, there are people whose names have been mentioned in this courtroom since the commencement of this trial who have lost their jobs.

Mr. McGohey: There isn't a scintilla of proof of that.

Mr. Gladstein: I will offer proof of it.

The Court: You will offer proof of it?

Mr. Gladstein: Yes.

The Court: We will meet that when we come to it, and I think it is better if you abstain from further obstructing the cross-examination and let the cross-examination proceed.

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—Tr. Tr. 10,253—

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Q. Isn't it a fact that Jack Simon got the highest number of votes? A. Not to my knowledge.

The Court: You know him? This Jack Simon?

Mr. Gladstein: Is the Court asking a question?

The Court: Yes, I am.

Mr. Gladstein: I would like to hear what it is.

The Court: I am asking the witness if she knows this man Jack Simon.

Mr. Gladstein: I object to that.

The Court: Overruled.

The Witness: I remember the name.

The Court: I didn't ask you that, Mrs. Hood.

The Witness: No, I didn't know him personally.

The Court: I say, do you know him?

The Witness: I do not know him. The name is familiar to me. That is what I meant to indicate.

The Court: Do you have some special meaning you give to the word "know"? I thought it had a rather common meaning. You seem to think it means something different from what I do.

Mr. Gladstein: No, your Honor.

The Witness: I should say No to the question. I do not know him. I didn't know him.

—Tr. Tr. 10,254—

Mr. Gladstein: I wish to object to the manner in which the Court—

The Court: The manner in which? I don't understand what you mean. You have been trying throughout this case by continuous number of absolutely false statements on this record to put down things that I am supposed to have said and done—gestures, indications of one kind or another. You will please stop that. I ask those questions in a perfectly ordinary tone of voice and without any manner that is unusual in any degree. I am not going to sit here and permit you to sprinkle this record with false statements and do nothing about it.

Mr. Gladstein: I assign your Honor's remarks

as misstatements of fact and prejudicial conduct prejudicing me—

The Court: You can easily avoid all this by stopping this procedure of putting false statements on the record.

Mr. Gladstein: I assign that remark as similar prejudicial misconduct.

The Court: You can assign all you want, but if you think I am going to sit here when you say I do things that I do not do, you are fooling yourself.

Mr. Gladstein: I ask your Honor to admonish the jury to disregard the things you have just—

—Tr. Tr. 10,255—

The Court: Ladies and gentlemen of the jury, I have often told you the case is to be decided by you on the proof, the evidence that comes from the witness stand and the documents in evidence. I repeat that nothing that may be done by the lawyers is proof either for or against any of the parties in the case and you will accordingly disregard what they may say or do, or any comments that may be made by me in that connection. They are of no concern to you nor do they have any bearing upon the issues.

Now go ahead, Mr. McGohey.

Mr. McGohey: Now, if the Court please, I would like the Court's permission to make a brief statement in regard to the colloquy just had.

Mr. Crockett: And after Mr. McGohey finishes I should like permission to make a brief statement for the record.

Hood—Cross
Colloquy

—Tr. Tr. 10,256—

Mr. McGohey: Have I your Honor's permission?

The Court: Yes, you have my permission, Mr. McGohey.

Mr. McGohey: Ordinarily it is not the function of counsel on either side in litigation to inject themselves into a controversy between the Court and counsel on the opposition, and I should not presume to do it now, your Honor, except for the fact that it seems to follow a definite pattern for the purpose of interrupting either direct or cross-examination by the Government.

Now, just a minute ago your Honor was charged with having said or done something which was designed to convey a notion to the jury hostile to the defendants. Mr. Gladstein, in arising to talk about it, was required to request your Honor to repeat the question that you asked because he said he couldn't hear it. Now, he is directly in front of your Honor and I submit that if it was said so quietly that Mr. Gladstein could not hear it, it must have been said so quietly that the ladies and gentlemen of the jury could not have heard it. So that raises the question in my mind, why is it done? It is done at a time when I am pressing for an answer to a question, which I have a right to ask on cross-examination, and it is being done at a time when we are about approaching the recess period.

—Tr. Tr. 10,257—

Now, I object to that, your Honor. I object to that and I ask your Honor to please enforce the rule which your Honor adopted months ago, and

which I am afraid Mr. Gladstein has been observing in the breach, that before argument be made in support of objection, the Court's permission to make the argument be secured because, I call your Honor's attention to the fact, since I started my cross-examination at the beginning of this afternoon session, I have been interrupted by long arguments by Mr. Gladstein and in no instance did he first secure your Honor's permission. So that the pattern is a part of a plan merely to disrupt the cross-examination, and, I say, to take the jury's mind off the point of the question.

Mr. Gladstein: Your Honor, may I be permitted a moment in reply?

The Court: No, Mr. Gladstein. I think you have said enough.

Mr. Gladstein: Can I waive the recess then so as to set Mr. McGohey's mind—

The Court: You waive the recess?

Mr. Gladstein: —so far as we are concerned, so it won't seem to anybody that the question of 3.30, if it is 3.30 or about it, had anything to do with my asking the Court about the Court's question. Rather

—Tr. Tr. 10,258—

than having anything to do with Mr. McGohey—

The Court: You always aim your shafts at me.

Mr. Gladstein: Your Honor was asking the question to which I was raising the objection. It wasn't Mr. McGohey and it so happens, and the fact—

The Court: Maybe we will all forget what was going on in a little while.

Mr. Gladstein: I hope not.

The Court: But I say I am going to keep my mind on it.

Mr. Gladstein: But when Mr. McGohey makes about two or three clear misstatements of fact, I should be permitted to point those out to your Honor.

The Court: Well, I suppose we would turn the trial into a dispute of questions of fact when, as I understand the judicial system here, I am the one to determine what happens in my court, and I shall do that to the best of my ability.

Mr. Gladstein: That is not what I was raising, your Honor.

The Court: Well, I think if you will just quietly sit down now and let Mr. McGohey proceed, it will be the wisest course to pursue.

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—Tr. Tr. 10,263—

. . . . . .

Q. Do you know anybody in Boston by the name of Grace Lorch?

Mr. Gladstein: I object to that.

The Court: Overruled.

A. Do I know anybody in Boston named Grace Lorch?

Q. Yes. A. There was a girl named Grace Lorch in Boston and I knew her, yes.

Q. Is she a member of the Communist Party?

Mr. Gladstein: I object to that.

A. I never asked her.

Mr. Gladstein: Just a moment.

The Court: How is that relevant at the moment, Mr. McGohey? Does the name come into the case somewhere?

Mr. McGohey: Well, I have been asking, your Honor, whether or not a person named Grace Lorch wasn't one of those elected at this convention to be a delegate—

The Court: Yes, I will allow it.

Mr. McGohey: —from Boston or from Massachusetts to the National Convention.

—Tr. Tr. 10,264—

The Court: I will allow it.

Mr. Crockett: Your Honor, doesn't this fall under that rule I have heard so much about, repetition? This witness has answered the question time and time again. Now we approach it from another angle, and it come right back to the same thing. As I understand the Court's ruling you want to cut down on this repetition.

The Court: I think what you understand from my ruling is that you are not supposed to argue without asking my leave. Now stop it.

Mr. Crockett: I am asking a question of the Court.

The Court: The answer is, the objection is overruled.

Q. You say you do know a lady named Grace Lorch?

A. I said—

Mr. Gladstein: No, that is not what the witness said.

A. (Continuing) I said—

Mr. Gladstein: Just a minute.

The Court: You know, I cannot escape the conviction that Mr. McGohey is right, that this bobbing up and objecting is for some purpose.

Mr. Gladstein: Well, if your Honor will have the record read you will find the witness said she knew a

—Tr. Tr. 10,265—

person by such a name at one time. Mr. McGohey now says "so you do know".

The Court: I never saw so much fuss and throwing of dust in the air. It must have some purpose.

Mr. Gladstein: Well, it is for the purpose of revealing the unfair thing Mr. McGohey is doing—

The Court: We are going on—

Mr. Gladstein: —he is twisting the testimony.

The Court: —we are going to sit here until Mr. McGohey is through with this phase of the cross-examination.

Mr. Gladstein: We can stay until ten o'clock, I don't care.

The Court: So if you think there is going to be some little recess here you may be mistaken.

Mr. Gladstein: Your Honor, if you will only be good enough to have the record read, to show—

The Court: I do not need to have the record read, but I wish you gentlemen would give Mr. McGohey a chance to proceed with his cross-examination.

Hood—Cross
Colloquy

Mr. Gladstein: Then why doesn't Mr. McGohey abide by the rule, which is that when you say to a witness something that refers to what the witness has testified to, a lawyer isn't supposed to distort or change the tense or meaning or context or content of the statement.

—Tr. Tr. 10,266—

The Court: Have you some idea you are trying to express?

Mr. Gladstein: Only that if your Honor will read—have the record read, you will see that Mr. McGohey in asking the last question misstated the witness's answer, that's all.

The Court: Well, this is getting too—too technical for me. I thought he was just trying to find out about her knowing this woman whose name he mentioned, and whether she was a member of the Communist Party. Now the witness has said that she knew the women. Now the next question is, is that women or was that women at the time of that convention a member of the Communist Party?

Now what is the answer, Mrs. Hood?

The Witness: I didn't ask her and I would rather not answer that question.

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—Tr. Tr. 10,335—

New York, July 21, 1949

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Q. Have you ever been convicted of a crime? A. I was arrested once.

The Court: Strike that out, and repeat the question.

Q. (Read.)

Mr. Gladstein: Perhaps the witness doesn't know. Sometimes you get picked up—

The Court: Well, he wasn't asked whether he was arrested or not. I don't want any comments at this point.

Mr. McGohey: If the Court please, may I remind—

The Court: You will get an answer.

Mr. McGohey: —may I remind the Court of what occurred yesterday afternoon? Here it comes again. Whenever I press a witness, Mr.—

The Court: A barrage of objections—

Mr. McGohey: —Mr. Gladstein, in defiance of the Court's order, undertakes to make an argument suggesting the answer, and I ask that he be directed to desist.

The Court: Please refrain from that today, Mr.

—Tr. Tr. 10,336—

Gladstein.

Hashmall—Cross
Colloquy

Mr. Gladstein: Your Honor, I think in all justice—

The Court: There is no occasion for discussion here. The question was perfectly plain, whether he was convicted of a crime, and he spoke about being arrested once. I struck that out. Now he will answer this question, and I don't want any comment or suggestion from counsel.

Mr. Gladstein: Certainly, he will answer, and I don't want any impression left that he is trying not to.

The Court: You are just going to keep on talking.

Mr. Gladstein: No.

The Court: Well, I tell you to desist.

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—Tr. Tr. 10,338—

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Mr. Gladstein: I think this is immaterial, not proper cross-examination, quite remote. I object to it.

The Court: Overruled. He says he doesn't re-

—Tr. Tr. 10,339—

member whether he was convicted or not. He is now being asked about what he was charged with, as I understand it.

Mr. Gladstein: Participating, apparently, in distributing leaflets.

Mr. McGohey: Here we go again, your Honor, the same objection that I made before.

The Court: Yes.

Mr. McGohey: Without any leave of Court, my cross-examination is interrupted whenever I press for an answer.

The Court: Yes. I will sustain the objection.

Mr. Gladstein: I would like to count the number of times my cross-examination, during the Government's case, was interrupted.

The Court: Yes, stopping to count that thing, that will be quite a little diversion, which I do not intend to have.

Mr. Gladstein: Yes, and I am willing to say that Mr. McGohey undoubtedly interrupted my examination quite as often as I have ever interrupted his.

(Laughter in the courtroom.)

The Court: It is nice to get a laugh but not important.

Go ahead, Mr. McGohey.

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—Tr. Tr. 10,381—

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Mr. Gladstein: I object to that question, incompetent, irrelevant and immaterial, and, moreover, calls for information concerning today.

The Court: Mr. Gladstein, I wonder if there is any way for me to get you to pay attention to my direction, that if you desire to argue you are to ask my leave.

Mr. Gladstein: Of course, your Honor. I wasn't arguing. I tried to point out the basis of the objec-

tion, not to argue in favor of it. Perhaps your Honor—

The Court: You have forgotten, I take it, that my ruling was that counsel should merely say "I object," and then ask my leave for permission to state anything further. Do you remember that?

Mr. Gladstein: Well, your Honor, of course.

The Court: You are generally very alert and smart, and we have had several colloquies about this, and I ask you, have you forgotten that I gave such a direction?

Mr. Gladstein: No, I haven't forgotten it.

The Court: I want an answer, Mr. Gladstein: Have you forgotten that I gave such a direction?

—Tr. Tr. 10,382—

Mr. Gladstein: I just did answer, your Honor. I said, "No, I haven't forgotten."

The Court: Now, having it in mind, I hope in the future you will observe it.

Objection overruled.

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—Tr. Tr. 10,426—

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Q. I am going to ask you, Dr. Phillips, to summarize for us what you taught in that school, that is, in any way connected—withdraw that.

—Tr. Tr. 10,427—

What you taught at that school.

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Gladstein: Now, your Honor—

Defendant Dennis: May I be heard on this?

The Court: Yes.

Defendant Dennis: As the Court knows, we are charged amongst other things in the indictment with organizing classes and schools to teach the principles of Marxism-Leninism. I believe it is point 9 in the indictment. I submit that we have the right as well as the obligation, and that the Court and the jury surely should want to hear what are the principles of Marxism-Leninism, and what we have taught and advocated in general and concretely in schools and classes. I believe Dr. Phillips has stated that he taught a class in the early part of '46 under the jurisdiction of the district leadership and in consultation with that leadership, the course which he submitted was approved by the Party leadership as part of the advocacy and teaching of the principles of Marxism-Leninism.

It also happens that the course which he taught, according to his testimony, embraced a part of the course in philosophy which he gave at the University of Washington, and therefore I must urge upon the

—Tr. Tr. 10,428—

Court to reconsider the ruling which has just been made and to permit the witness, at least briefly, to state what he advocated and taught as part of the official advocacy and teaching of the Communist Party.

The Court: Well, I have ruled that there is no proper foundation laid for such proof.

Mr. Gladstein: Because a particular defendant wasn't involved in the conversation, your Honor? Because if that is it, and that is the only thing I heard your Honor say, could I remind the Court that we have heard from Government witnesses who did in no wise connect any of the defendants. Take for example the testimony—and indeed your Honor has permitted testimony from one or two defense witnesses concerning schools that they conducted or participated in as to which there was no immediate direct conversation with any particular defendant.

—Tr. Tr. 10,429—

The Court: Well, I do not desire to have any further discussion on it, Mr. Gladstein. I think I understand the situation very well and it is clear to me that there has been no foundation laid for this proof.

Mr. Gladstein: That simply means, your Honor, that we are not permitted to put in evidence as to what was actually taught in the schools.

The Court: You know, in any ordinary or extraordinary trial that I have ever had any contact with when a matter is presented, argued and the Court rules, the lawyer passes on to something else. But in this case, no, there must be a series of protests and long protests and speeches ad infinitum, and I tell you please don't do that.

Mr. Gladstein: But, your Honor, I called this witness precisely and exclusively to testify to what was taught—

The Court: All that means is that you are sorry that you did not fulfill the requirements that I deem essential.

Mr. Gladstein: I was about to say that precisely because I was heeding that portion of your Honor's request that your Honor has several times announced that your Honor wanted to hear what was taught in the schools and the courses conducted by the

—Tr.. Tr. 10,430—

Communist Party that I called this witness. That is exactly what this witness is here for. And I submit that foundation has been established not only adequately but more than adequately, but now at the threshold of the testimony as to what he actually did teach we are met with objections by the United States Attorney who thereby makes it clear that he does not want the jury to hear what was taught and advocated within the Communist Party schools.

The Court: I suppose there is no way to avoid a certain amount of this thing in this case. I tell you to stop and you don't, you go on. I don't intend to shout or bang a gavel or make a big noise about it and I will not discipline the attorneys during the continuance of the trial for the reasons which I have had occasion to express during the course of the trial a number of times. If after that you insist on going on I have no alternative but to quietly and pleasantly bear it and occasionally tell you again to please stop.

By Mr. Gladstein:

Q. Well, I want to refer to paragraph 10 of the indictment, if I may.

The Court: You may do so.

Q. (Continuing) Let me read this to you, Doctor. It is

—Tr. Tr. 10,431—

charged in the indictment that:

> "It was further a part of said conspiracy that said defendants would conduct, and cause to be conducted, schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."

Now in the class that you conducted did you teach the principles of Marxism-Leninism?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you teach or advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Gladstein: Well, your Honor, I have no questions that I can possibly put to this witness under the Court's rulings because I am blocked from eliciting testimony.

The Court: You don't need to make comments like that, Mr. Gladstein. You know that they are offensive to the Court. You know that every time you say about your being blocked or about my trying

—Tr. Tr. 10,432—

to get something or other over to the jury, all that

sort of thing, it is impugning my motives and practically charging me with dishonorable conduct. As I said, I don't like that and there is nothing I can do about it other than to tell you not to do it. Some day I think probably you may regret that. You have been so persistent in that contemptuous manner of talk—

Mr. Gladstein: I can't complete the examination of the witness under the Court's ruling.

The Court: If you have no further questions, say so.

Mr. Gladstein: I do have further questions.

The Court: And let the matter rest rather than making these comments impugning my intent, impugning my integrity.

Mr. Gladstein: That was not the purpose or effect.

The Court: When you say somebody—and that somebody must be me—has blocked you from doing this or that, it can have no other meaning than that of impugning my integrity. But I bear it in good part. I have had six or seven months of it and I can bear a little more of it in patience and good humor.

Mr. Gladstein: I say that wasn't the purpose.

The Court: I told you a little earlier I am not

—Tr. Tr. 10,433—

the over-sensitive type and I have come to recognize your sarcasm very quickly.

Mr. Gladstein: I think your Honor's observations are not only improper but they represent a strained and incorrect interpretation of what I have said and

done and I submit they are prejudicial and constitute misconduct.

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—Tr. Tr. 10,498—

New York, July 22, 1949

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Q. Now at the outset of the first session in that school, Mr. Kirchmarek, what discussion, if any, occurred with respect to arrangements or plan for the holding of the school?

Mr. McGohey: Object.

The Court: Sustained. Now, Mr. Gladstein, you see the point of that, don't you?

Mr. Gladstein: Well, I suppose your Honor wants to establish some names.

The Court: It is obvious that without that you don't have testimony such as you have in any other case. This case is no different from other cases that you can have conversations with unknown and unidentified people.

Mr. Gladstein: Well, there is nothing unknown or unidentified—

The Court: Nobody could ever refute that sort of proof if witnesses were allowed to come in and say "I had a conversation with a lot of people, I don't remember who they were, maybe this and maybe that." You can't refute that sort of proof, and the law takes cognizance of the fact that there are two sides to every controversy.

Mr. Gladstein: Yes, but I think the law and the Court should take cognizance of the fact that with

—Tr. Tr. 10,499—

respect to certain persons in this day and age the naming of names means persecution.

The Court: Well, you went through that on Mr. Gates' appeal and the Court of Appeals ruled against you. There is no use going into that again.

Mr. Sacher: May it please the Court, I should like to address the Court—

The Court: No, I am not going to have any argument.

Mr. Sacher: Well, I want an instruction to the jury, in the light of your Honor's reference to the Gates decision—I ask that your Honor at least instruct the jury to disregard that and not take it into account in passing on the evidence.

The Court: I will do that.

Ladies and gentlemen of the jury, that has got nothing to do with this case. You will please disregard it. It is only a question of law here, and I rule, as I have right along here, that if you are going to put in evidence you are going to have to show the time and the place and who was there, and if there is conversation with somebody, we have got to know who that somebody was.

Q. Well, the name of George Siskind has been mentioned as an instructor in that school, Mr. Krchmarek. Was he—

—Tr. Tr. 10,500—

Mr. McGohey: Now if the Court please, I object to this. There hasn't been any suggestion by this witness—

If the Court please, may I have permission?

The Court: Yes, you may.

Mr. McGohey: Now here is a deliberate leading of this witness to suggest the name of a man already mentioned. The witness says there was a discussion. It doesn't appear whether it was a discussion of one individual with this witness, or whether there was a group discussion, whether there were five people or ten or fifty, and now Mr. Gladstein, in view of your Honor's ruling, has the effrontery to instruct this witness as to the name of a person previously testified to by somebody else, and I say thereby to suggest to this witness the name of a man whom he is now free to name.

The Court: I think that is so, Mr. Gladstein, and it is entirely improper and you will please not do it again.

Mr. Gladstein: May I put a question to the witness?

The Court: The testimony comes here not according to the commands of counsel, or other persons, but according to the relevancy and propriety of the question.

Mr. Gladstein: Well, I did not utter a command or

—Tr. Tr. 10,501—

anything of the sort.

The Court: It was obvious to me you were telling

the witness it's all right to name Siskind because he is already in the record. I am not so dumb that I can't see that, and everybody else, and I won't have it.

Mr. Gladstein: Does your Honor suppose that an attorney puts a witness on the stand without his first having found out from that witness what he knows, and does your Honor suppose that I did not know what this witness's own knowledge is? I am not telling the witness what to testify. He knows the facts.

The Court: Now that you ask me I think there is a good deal of what he said this morning that you never heard before in your life, but we are not going into that. I am telling you now not to repeat the offense that I have just described to you, and you may ask him to say who was there and not tell him, or any other witness, that he may answer that there was something already in the case about that man, or somebody else has named that person. I consider that wholly improper. Now you will please not do it again.

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—Tr. Tr. 10,671—

New York, July 27, 1949

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Q. Was Mr. Williamson's title at that time district organizer? A. Yes.

Q. Is that what the State Chairman was known at that time? A. District organizer, not the chairman.

The Court: Are you saying that State Chairman and district organizer are the same thing?

The Witness: No, it is not the same thing, but his title at that time was district organizer.

The Court: Then he was not the State Chairman?

The Witness: No.

Mr. McGohey: Now if the Court please, will you hear me for a second?

The Court: Yes, I will.

Mr. McGohey: I object to this leading of the witness in this way. That was a clearly leading question. I do not know that it is of great importance because it only goes to the question of what the title was but the witness was asked what Mr. Williamson's position was. He was asked, was he the State Chairman, and he said "Yes." Then he was asked,

—Tr. Tr. 10,672—

was he the district organizer. Now I think we ought to have from the witness what position he held. I do not think we ought to have counsel putting the words in his mouth.

The Court: I think that is so, too, but it seems quite remote here and relatively unimportant.

Mr. McGohey: Well, your Honor, that is so and I indicated that when I first addressed myself to your Honor—

The Court: What are you laughing about, Mr. Sacher? I do not like that at all. You keep it up all the time.

Mr. Sacher: You have asked me a question and I would like to answer it.

The Court: What is that?

Mr. Sacher: You have asked me a question and I would like to answer it.

The Court: Go ahead and answer it.

Mr. Sacher: Mr. McGohey says this is a matter of no importance and then proceeds to spend a lot of time discussing a matter of no importance.

The Court: Well, I do not think it is so funny It may seem so to you.

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—Tr. Tr. 10,698—

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Q. Did the Party have fractions at that time?

Mr. Sacher: I object to this.

The Court: Overruled.

A. Now, at that time I wasn't acquainted with the Party—

The Court: Mr. Sacher, you cannot laugh these things off.

Mr. Sacher: I am not laughing anything off.

The Court: You must have laughed at something, and it is very offensive to me.

Mr. Sacher: It is so obviously unrelated to the case, I cannot imagine why it is being asked.

The Court: Well, I can imagine, and I imagine there are others who can too, and I think, perhaps, that is the reason you are laughing—

Mr. Sacher: No, that is not the reason at all.

The Court: —laughing it off.

Mr. Sacher: That is not the reason I am laughing.

—Tr. Tr. 10,699—

The Court: You should stop.

Mr. Sacher: And I should say that I haven't been laughing.

The Court: You should have thought of that first.

Mr. McGohey: If the Court please, may I be heard for a moment?

I desire to call the Court's attention to the fact that we are now having a repetition of what we had the other day with Mr. Gladstein.

Mr. Sacher: I object to that—

Mr. McGohey: May I be heard, your Honor, without this constant interruption?

Mr. Sacher: I object to that, Mr. McGohey characterizing my conduct.

The Court: He is just taking this opportunity to make another one of these rumpuses.

Mr. Sacher: I object. I am not doing anything like that, but I object to Mr. McGohey arrogating to himself the function of the Court in criticizing me.

The Court: When a lawyer is speaking to the Court, it is usually good taste, to say the least, for the other lawyers to wait—

Mr. Sacher: Not while bad taste—

The Court: —and not to interrupt him. You have

—Tr. Tr. 10,700—

a way of interrupting people which, I suppose, you will continue to do until the end.

Mr. Sacher: If I am unjustly attacked, I will do it.

The Court: I tell you not to do it.

Mr. Sacher: If I am unjustly attacked, I am obliged to do it, your Honor.

The Court: You always seem to think somebody is attacking you, or something of that kind.

Now, Mr. McGohey, will you go ahead and tell me what you were saying?

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—Tr. Tr. 10,726—

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Mr. Sacher: Well, I would like to have it noted that the question has been changed, your Honor, in the course of these repetitions.

The Court: Well, I am not going to interrupt the cross-examination to examine into such minutiae. The last question will serve.

Mr. McGohey is cross-examining and I will permit the question.

Mr. Sacher: I should just like to point out that it used to be done to me on cross-examination.

The Court: What is that?

Mr. Sacher: It used to be done to me on cross-examination.

The Court: What used to be done to you?

—Tr. Tr. 10,727—

Mr. Sacher: This business of pointing out that a question was not in the precise words of the preceding question.

The Court: I recall nothing of that kind. I take it that is another one of your offensive comments attempting to make it appear that I am partial to the Government—

Mr. Sacher: No, it is a statement of fact.

Kirchmarek—Cross
Colloquy

The Court: Well, kindly refrain from such things unless you have some basis for it.

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—Tr. Tr. 10,765—

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Q. And that at that meeting there was discussed the draft resolution of the National Board? A. That's right,—the National Committee.

Q. Of the National Committee? A. Yes.

Q. Now I understood you—did you say the draft resolution of the National Committee? A. June 2nd, I think it was.

Q. Now this meeting that you attended of the State Committee was on June 17th, was it not? A. Yes.

Mr. Sacher: The witness—excuse me—is referring to a resolution of June 2nd, and I think rather than play around—

Mr. McGohey: Now if the Court please, here we go.

Mr. Sacher: Well, he just said June 2nd, your Honor, and I think—

The Court: Mr. Sacher, is there no way that I can prevent you from interrupting the cross-examination as usual? You have been repeatedly told by me not to do that.

Mr. Sacher: I am not interrupting, your Honor; I am—

The Court: You are interrupting. You will please not do it again. I think you are taking advantage

—Tr. Tr. 10,766—

of my statement that I would not take any action against the lawyers here during the trial. I hope you will bear that in mind.

Mr. Sacher: Your Honor, it is very little comfort to be threatened almost daily with what will happen to one after the trial—

The Court: Yes.

Mr. Sacher: —so I am not encouraged by anything.

The Court: Yes. It is much easier for a lawyer to pay respect to the Court and to follow obediently the Court's directions rather than flouting them daily and persistently as you do.

Mr. Sacher: I have not flouted either daily or persistently and have never had any intention and do not now have the intention of doing any such thing.

The Court: I say you do and you will please stop.

Mr. Isserman: I must object to your Honor's remark made in the presence of the jury which cannot but make the defense of our clients more difficult and to prejudice that defense.

The Court: It seems to me the thing to do then is to behave yourselves.

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Kirchmarek—Cross
Colloquy

—Tr. Tr. 10,784—

New York, July 28, 1949

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Q. Very well. Now in 1947 the Party members in Ohio who were, as a rule, using first names or at least in some instances were using first names, were they not?

—Tr. Tr. 10,785—

Mr. Sacher: I object to the question, your Honor, because it has—

The Court: Overruled.

Mr. Sacher: —two opposites.

The Court: I am not going to have it started again, Mr. Sacher, like yesterday.

Mr. Sacher: But I object—

The Court: I overrule your objection. I don't want to hear any argument.

Mr. Sacher: But it is contradictory. It speaks of a rule and it speaks of "sometimes." Now which is it? Is it sometimes or is it a general rule?

Mr. McGohey: I will withdraw the question and reframe it, your Honor, so that we can save the argument and get on.

The Court: I wish to state on the record that I am physically and mentally incapable of going through very much more of this wrangling and argument and I shall have to do something about it if it is continued and counsel refuse to obey my admonition. It is more than any human being can stand.

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—Tr. Tr. 10,788—

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Q. That was Helen Krchmarek, wasn't it?

Mr. Sacher: I object unless the witness knows.

The Court: The question seeks to elicit his knowledge.

A. I don't know whether that was Helen Krchmarek.

Mr. McGohey: Well, there it is. It is obvious with that kind of objection in that form—

Mr. Sacher: I move to strike out that remark and ask that your Honor instruct the jury to disregard it.

Mr. McGohey: If the Court please, may I be heard?

The Court: Yes, you may.

Mr. McGohey: Your Honor, I have objected before that Mr. Gladstein by the method of his interruption, the manner of his interruption, and the

—Tr. Tr. 10,789—

timing of his interruption, so conducted the interruptions as to coach the witness, and I now say that twice stating an objection in this form, which your Honor has said may not be done—your Honor has instructed all of us that we may only say we have an objection, and if the Court wishes to ascertain the ground of the objection the Court will ask for it. Now three times, or at least twice Mr. Sacher has gotten up and I say he instructed the witness by saying repeatedly "If the witness knows." That was the purpose of the question, to find out if he did know. I say with that kind of an objection

handed to him twice, it is now obvious that he got the signal.

Mr. Sacher: May I be heard, your Honor?

The Court: Yes.

—Tr. Tr. 10,790—

Mr. Sacher: May I now be heard, your Honor?

The Court: Yes.

Mr. Sacher: I say to your Honor that what Mr. McGohey had done is the most reprehensible thing that could be done in the course of a trial: he has accused me of unprofessional and improper conduct. To say that I resent it is to understate the situation.

I respectfully submit to the Court that in the 25 years that I have practiced in all the courts of this State, I have never descended to the kind of practice that Mr. McGohey charges me with, and I insist that he owes me an apology.

And on the basis of what he has said, I move for a mistrial on the ground that that kind of statement, made by the United States Attorney in the course of a trial, denies these defendants an opportunity for a fair trial.

The Court: The motion is denied.

I wish you would explain to me, Mr. Sacher, why, in view of my repeated admonition that lawyers for both sides, in objecting, should merely say "I object," and not say anything more without my leave, I wish you would you explain how it was that you happened to make the comment that you did?

Mr. Sacher: I shall be glad to do that, your Honor.

—Tr. Tr. 10,791—

The Court: Do it now.

Kirchmarek—Cross
Colloquy

Mr. Sacher: I will. In the last two or three weeks that I have sat in this court, I have observed Mr. McGohey time and time and time again, stating objections to questions without obtaining leave of the Court. As a matter of fact, I rose last week—

The Court: So you did it deliberately?

Mr. Sacher: I didn't do it deliberately but what has happened, your Honor, is that there has developed such a laxity in the application of the rule to the United States Attorney that sometimes we forget, as we rise to state our objections, that we are limited to those words. That is the point.

The Court: Did you forget?

Mr. Sacher: Of course I did, your Honor.

The Court: Then please don't forget again.

Mr. Sacher: I will do my best not to.

Mr. Isserman: If the Court please, may I be heard for a moment?

The Court: I suppose my mentioning my state of fatigue has merely served as a spur to additional argument this morning.

Mr. Isserman: If the Court please, I respectfully object to your Honor's remark and still ask if I may be heard on this subject.

—Tr. Tr. 10,792—

The Court: You go ahead.

Mr. Isserman: I want to say a word on behalf of Mr. Gladstein, who isn't in this courtroom this morning to answer. I first remake the motion—

The Court: I must take a recess now and lie down for a minute or two.

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—Tr. Tr. 10,981—

New York, July 29, 1949

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The Court: I shall not pursue my usual policy of dismissing the jury because I take it this discussion is not to be too lengthy, Mr. Dennis?

Defendant Dennis: At this point, your Honor, I rise to move for a mistrial in view of the Court's announcement and previous rulings which, in effect, are designed to limit the defense to a skeleton rebuttal of the false testimony introduced by prosecution witnesses, and to refutations of the Nazi-like interpretations of the principles of Marxism-Leninism.

In view of the biased and prejudicial rulings, restricting the—

The Court: You mean bias of mine?

Defendant Dennis: Biased, as I understood them, your Honor.

—Tr. Tr. 10,982—

The Court: I say, but you mean bias by me? Do you say that?

Defendant Dennis: On the part of the Court.

The Court: That is what I thought. I thought it might be well to have it clear what you claimed.

Defendant Dennis: In view of the numerous prejudicial rulings on the part of the Court, restricting the defense from presenting vital written and oral testimony regarding many fundamental aspects of the advocacy and teaching of our Party—

The Court: To wit—

Defendant Dennis: —such as has been done—

The Court: —some vital aspect of your teaching now that I ruled out?

Defendant Dennis: One aspect, and a very crucial one, was the ruling of the Court on the article and document prepared by Mr. Foster, which is an official part of our teaching. Another was—

The Court: Why, he prepared that after the case was half over.

Defendant Dennis: Another was a—another was the joint article which Mr. Green and I prepared, which was ruled out and subsequently, due to the—

The Court: So one of the errors is that I admitted something that—

—Tr. Tr. 10,983—

Defendant Dennis: I would like to continue with my motion.

The Court: Well, you see, Mr. Dennis, curious as it may seem to you, I have a right to understand because you are addressing the motion to me and not to the public at large, and so, if I choose to question you, that is my undoubted privilege.

Now, go ahead.

Defendant Dennis: Apropos this point, the ruling of the Court in connection with the testimony of Mr. Phillips, where he was prevented from stating to the Court and the jury the principles of Marxism-Leninism, which were what he taught in a Party school in the State of Washington, and which was a part of the course which he gave in the

University of Washington. Other instances could be cited.

And I say, further, in view of the measures which the Court has taken against defense witnesses, in view of all these things, it is clear that we defendants are being deprived of due process and our constitutional rights, and that it is utterly impossible to obtain a fair trial.

In view of this, your Honor, I move for a mistrial.

The Court: The motion is denied.

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—Tr. Tr. 11,028—

New York, August 1, 1949

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The Court: Overruled. What was the answer, Mr. Reporter, please?

(Answer read as follows:)

"Plus others."

Q. It was formed by people who had been in the Young Communist League, wasn't it?

Mr. Isserman: I object to that question.

The Court: Overruled.

A. As I recall it, it was formed by delegates who had dissolved the YCL, plus other youth who were invited to participate.

Q. Now, did you go to any AYD schools?

Mr. Isserman: I object to that question.

The Court: Overruled.

A. No, I didn't.

Q. Now, up to 1945, in December, had you attended any other schools of the Young Communist League?

Mr. Isserman: I object to that question.

Q. (Continuing) Apart from the one that was held at your home?

The Court: Overruled.

A. No, I didn't.

Q. Since 1945 have you attended any other schools of the Communist Party? A. No, I haven't.

—Tr. Tr. 11,029—

Q. Now, since 1945 have you taught at any other schools of the Communist Party other than the two that you told us about this morning?

Mr. Isserman: I object to that question.

The Court: Just a moment.

When you refer, Mr. Gordon, to the teaching by Mrs. Hall in Communist Party schools, I take it you refer to those two one-day sessions, one in September 1946, and the other in the beginning of July 1948, concerning which the witness testified this morning?

Mr. Gordon: Yes, your Honor.

The Court: Very well, I will overrule the objection.

Mr. Isserman: If the Court please, there is no indication that the question is limited to the indictment period, and it does not refer to any school.

The Court: I will allow it.

Q. Do you have the question in mind, Mrs. Hall?

The Witness: Will you repeat it?

(Question read.)

A. Yes.

Q. When?

Mr. Isserman: I object.

The Court: Overruled.

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—Tr. Tr. 11,031—

Mr. Isserman: I object to that as argumentative. It is not based on the facts in evidence as testified by this witness.

The Court: Mr. Isserman, do you remember my admonition, that when counsel objects, counsel is merely to state "I object"? You have violated it several times this morning. Did you forget?

Mr. Isserman: I am reminded of it now. It is a habit that goes back over 25 years. It is hard to give up that habit, which your Honor has undoubtedly engaged in yourself.

The Court: Every time you do that your action is contemptuous and direct, I think, wilful and deliberate disobedience of my command.

Mr. Isserman: I must object to your Honor's characterization of my conduct.

The Court: I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous.

Mr. Isserman: I must object to your Honor's finding.

The Court: Very well.

—Tr. Tr. 11,032—

Mr. Crockett: In so far as the Court's remarks are intended to cover any conduct on my part, I respectfully object.

The Court: Very well.

Mr. Sacher: May it please the Court, I should like also to note an objection.

The Court: Well, you have been one of the chief offenders.

Mr. Sacher: May I, therefore, take exception, particular exception, to that designation because I am not aware I have ever done that—

The Court: Oh, yes.

Mr. Sacher: Wilfully or deliberately.

The Court: Well, I am used to hearing your statements about how innocent you are.

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New York, August 2, 1949

—Tr. Tr. 11,185—

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Q. Did his report—was his report on the subject of youth?

Mr. McGohey: Objection.
The Court: Sustained.

Q. What was the subject of his report?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you hear his report?

Mr. McGohey: Objection.
The Court: Sustained.

Q. In giving his report did Mr. Hashmall speak about an attack upon his home?

Mr. McGohey: Objection.
The Court: Sustained.

Q. In giving his report did Mr. Hashmall speak in any manner about the subject of youth?

Mr. McGohey: Objection.
The Court: Sustained.

—Tr. Tr. 11,186—

Q. In the course of his report did Mr. Hashmall read from a newspaper?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. McGohey: Will your Honor hear me for a moment?

The Court: What is that?

Mr. McGohey: Will your Honor hear me for a moment?

The Court: Yes.

Mr. McGohey: Your Honor has sustained an objection to a question asking what did Mr. Hashmall say, and now we are getting a series of questions suggesting a whole range of subjects assuming that they were the subjects of the speech. I object to the line of questioning.

The Court: Well, I think it is sufficiently plain to the jury and to everyone here, and I plainly stated yesterday the way I was going to rule. I have allowed a good deal of evidence here on behalf of the defendants showing how other people were guilty of force and violence as it was claimed, although I thought it was not very close to the issue here, but yesterday I put a stop to it, and that stop is going to remain. We are not going to have any more testimony on behalf of the defendants about the lynchings, the attacks on people's houses, and

—Tr. Tr. 11,187—

the various other force and violence that has little if any bearing on this case. The question here is not whether others were guilty of teaching and advocating, or pursuing a policy of force and violence, but whether these defendants and those may be found to have conspired with them, conspired to

teach and advocate the overthrow of the Government by force and violence. And, so, having permitted what I thought was ample testimony to make the position of the defendants plain on that subject, I have reached the point where I write finish.

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—Tr. Tr. 11,228—

New York, August 3, 1949

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A. No, I did not let him take my car for that purpose.

Q. Didn't you let him use your car so that it would be more difficult to trace him riding around in a car bearing your license and your registration?

Mr. Gladstein: This has not only been asked and answered but it raises a question about after the indictment. I think this is objectionable—

—Tr. Tr. 11,229—

The Court: You are again contemptuous, Mr. Gladstein. You have defied my admonition. Please cease to do that. If that is an objection, it is overruled.

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—Tr. Tr. 11,247—

Q. In connection with Mr. Green's supervision, on the occasions when he saw you, did you give him any report as to the work you were doing?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did Mr. Green give you any directions or instructions on the work you were to do as section organizer or as membership director of the Section?

Mr. McGohey: Objection.
The Court: I will allow a yes or no answer.
The Witness: May I hear that again?

Q. (Read.) A. He did.
Q. What instructions did he give you on these occasions in connection with educational work in the clubs of your section?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did he give you any instructions on educational work that you were to carry out in the clubs of your section?

Mr. McGohey: Objection.
The Court: Sustained.
Can you not conform yourself to my ruling, Mr. Isserman?
Mr. Isserman: If the Court please, there is a diffi-

—Tr. Tr. 11,248—

culty which I would like to explain to the Court.
The Court: I gather your answer is in the negative.
Mr. Isserman: I will try to do what I can but it

is impossible to do it adequately, to present this testimony.

The Court: Then you will do it or I will ask this witness to step down from the stand and you will have to call the next witness.

Mr. Isserman: I must object to your Honor's—

The Court: Very well. I told you—

Mr. Isserman: —ruling in this respect.

The Court: —yesterday and the day before what was to be done, and I mean business.

Mr. Isserman: I must object to your Honor's remark as being prejudicial to the defense of this case—

The Court: Your comment is noted.

Mr. Isserman: —not allowing counsel to carry out his obligation to represent his clients.

The Court: It is a very simple thing, Mr. Isserman, for you to direct the attention of this witness to a particular conversation—

Mr. Isserman: I would like to explain—

The Court: —and have her state where it was, who was there, and the time, and bring out what you desire.

Mr. Isserman: I would like—

—Tr. Tr. 11,249—

The Court: If you cannot do that for some reason known to you but not to me, I have told you what I will do.

Mr. Isserman: I would like to explain to the Court the reason why—

The Court: I don't want any explanation.

Mr. Isserman: —that procedure does not bring forth the evidence which this witness can give.

The Court: I don't want any explanation. You told me that you confer fully with the witnesses before you call them, that you know what they are about to testify to, and you must know that there is some conversation, or if more than one, then more than one, in which there is material relevant to the case. If so, direct your attention to it.

Mr. Isserman: I must object to your Honor's direction as given.

The Court: Very well.

Q. Now, do you recall any particular conference with Mr. Green on the question of education in the year 1946? A. Yes.

Q. And how many conferences did you have in that year with Mr. Green on the question of education? A. There have been many but I would like to mention only a few.

Q. Would you mention the first one?

—Tr. Tr. 11,250—

The Court: No; what you would like to do, Mrs. Lightfoot, is not very important here. Your function is to answer the questions, which I hope you will do.

Q. Would you answer the conversation—I am sorry. Would you give us the conversation you had with Mr. Green on one of the occasions that you remember on the question of education?

Mr. McGohey: I object.

The Court: Sustained. She must first fix the time and the place and who was present.

Q. Are you able to fix the time and place of the particular conversation you have in mind, Mrs. Lightfoot, approximate time? A. Yes.

Q. When was it? A. Some time during May—around the end of May of 1946; the place was in the district office of the Party.

Q. And who was present with you and Mr. Green? A. As I recall, Mr. Green, Claude Lightfoot, who was the organizer of the South Side at that time, and I.

Q. Now will you tell us what was said on that occasion?

Mr. McGohey: Objection.

The Court: Let me hear the question.

(Question read.)

The Court: You mean what Mr. Green said.

Mr. Isserman: Yes.

Tr. Tr. 11,251—

Q. Will you tell us—well, did Mr. Green start the conversation or did you start it, Mrs. Lightfoot?

The Court: These are instructions that Mr. Green is said to have given to the witness?

Mr. Isserman: That is true.

The Court: Go ahead and tell us what he said.

Mr. Isserman: The instructions are the result of a conversation, after a request—

Mr. McGohey: That, if your Honor please, is objected to.

The Court: All right.

Q. Did you initiate the conversation?

The Court: No; Mrs. Lightfoot, you listen to me. Now you go ahead and tell us what Mr. Green said to you on the occasion when you said he gave you instructions in the end of May 1946 in the district office of the Communist Party in Chicago when you and Mr. Green were there alone together.

Mr. Isserman: If the Court please, I object to that question. The testimony—it doesn't—

The Court: I do not want to hear any argument.

Mr. Isserman: I object to the question as improper.

The Court: Your objection is overruled.

Now go ahead, Mrs. Lightfoot.

Mr. Isserman: Now I would like also to note an

—Tr. Tr. 11,252—

objection on the record to the Court's taking over the examination of the witness.

The Court: Very well; your objection is noted and overruled.

The Witness: As I recall, near the end of May in 1946, in the district office, with Mr. Green, Mr. Lightfoot and I, after there had been some discussion on the mounting wave of lynchings against the Negro people, particularly the one in February in Columbia, Tennessee, when a whole community—

Mr. McGohey: Now if the Court please, I object.

The Court: I will sustain the objection.

Mr. Gladstein: I object to cutting off—

The Court: We are going to have no more about the subject matter that is now coming up. I said

that yesterday and the day before, and that is out. Now if there was something to do with matters of a different character, they may be pursued.

Mr. Gladstein: Your Honor—

The Court: I do not desire to hear you, Mr. Gladstein. This trial is going to move now. We are at an end of these peripheral matters and we will not have any more of that.

Mr. Isserman: I must object to your Honor's remark and to the characterization of the matters

—Tr. Tr. 11,253—

in this case as peripheral matters.

The Court: Very well; your objection is noted.

Q. Will you give us specifically the instructions which Mr. Green gave you?

Mr. McGohey: If the Court please, I object unless they are going to be—I beg your pardon.

The Court: Well if the witness—I will try it and see if the witness can avoid that sort of material and tell us just exactly what the instructions were. If it turns out that they were instructions to go about the subject of grievances of the Negroes or other matters that I feel have been sufficiently covered, I shall stop the witness.

Mr. Isserman: They are instructions relating to the educational activities of the Party in that respect.

The Court: Yes. I am quite familiar now with answers that numerous witnesses called by the defense give to such questions and how they then,

instead of going into the matters pertinent to the charge directly, go into these other matters, and I have said I will let the witness give a brief description of the instructions. If I find that they go into matters that I have ruled out, I shall stop them.

Mr. McGohey: Will your Honor hear me for just a minute?

—Tr. Tr. 11,254—

The Court: Yes.

Mr. McGohey: I don't know whether your Honor heard counsel's observation in answer to your first statement. Mr. Isserman, as I heard him—and I think the record will bear me out, said that these were instructions to the witness about education "in that respect," meaning the respect of the subject matter that the witness started to talk about.

The Court: Did you say that, Mr. Isserman?

Mr. McGohey: On that basis I press my objection

Mr. Isserman: I believe I did, your Honor.

The Court: Then I will sustain the objection.

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—Tr. Tr. 11,268—

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Q. Did you, in discussing point 5, discuss the question of attaining Socialism?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you discuss the question of attaining Socialism by the policies of the Communist Party of the United States?

Mr. McGohey: Objection. She said she did not.

The Court: Yes.

Mr. Isserman: She hasn't answered that question.

The Court: I will sustain the objection.

Mr. Gladstein: I object to Mr. McGohey's remark. It is not an accurate statement.

The Court: Overruled.

Q. Did you discuss, in connection with item 5, the struggle of the Communist Party to the goal of Socialism in the United States in the period April 1945 to July 20, 1948?

Mr. McGohey: Objection.

The Court: Read me that question, Mr. Reporter.

Q. (Read.)

The Court: Sustained.

Q. Mrs. Lightfoot, what did you teach the class in re-

—Tr. Tr. 11,268a—

spect to the matter which is listed under Roman numeral V?

Mr. McGohey: Objection.

The Court: Sustained.

Q. I call your attention to item C, which appears on that page, that is, the page entitled "Topic II", under a heading "What is the strategy of the workers?" and ask you if you discussed that matter—if you taught the class anything on this subject?

Mr. McGohey: Objection.

—Tr. Tr. 11,269—

The Court: Mrs. Lightfoot, in this matter of the strategy of the workers, did you discuss the dictatorship of the proletariat, imperialism, and just and unjust wars, and things of that kind, or were they not mentioned?

Mr. Isserman: I object to the question.

The Court: Overruled.

The Witness: Under topic 3—under topic C—

The Court: You will answer that question yes or no or state that you cannot answer it.

Mr. Gladstein: I object to the Court's tone and manner of badgering the witness.

The Court: There is nothing about my tone, and you will please sit down.

Mr. Gladstein: I desire to make an objection.

The Court: Mr. marshal, will you just—

(To the reporter) Read the question to the witness.

We will have no more monkey business here.

Mr. Gladstein: I object to the ruling.

—Tr. Tr. 11,270—

Mr. Isserman: I object to the Court's remark.

The Court: You will sit down, Mr. Gladstein.

Mr. Isserman: And I want to register an objection to the Court's ruling.

The Court: Very well.

Mr. Isserman: As prejudicial to the conduct of the case and to the defense and making the defense impossible.

The Court: When I desire to ask a question, I am going to ask it. I am through with the interference of counsel.

Now go ahead and read the question, Mr. Reporter.

Mr. Isserman: May I ask the Court a question?

The Court: You may not.

(Question read.)

Mr. Isserman: I object to that question.

The Court: Overruled.

A: Under C I discussed—

The Court: Mrs. Lightfoot, did you hear me tell you to answer that question, either that you did discuss those subjects or that you did not discuss those subjects? Now which was it? You did discuss them or you did not discuss them.

Mr. Isserman: I object to that question.

The Court: Overruled.

—Tr. Tr. 11,271—

Mr. Gladstein: Your Honor—

The Court: Overruled. I don't want to hear anything from you, Mr. Gladstein.

The Witness: The way that the question was—I heard the question. It says—.

The Court: Then you will answer it the way I tell you to, Mrs. Lightfoot. Now did you discuss those subjects or did you not?

The Witness: The question includes "things of that kind," and—

The Court: Then I will take out "things of that kind."

Did you—

The Witness: May I hear the question?

The Court: I will give it over again.

Did you in that lecture discuss, when treating the subject of the Strategy of the Workers, the Dictatorship of the Proletariat, Imperialism, Just and Unjust Wars, or any of them?

The Witness: Well, were they mentioned during the course of that discussion, is that what you are asking me?

The Court: Well, I suppose that word "discuss" has some peculiar meaning in the Communist Party—

Mr. Isserman: I object to that characterization.

—Tr. Tr. 11,272—

The Court: I will reform my question.

Did you mention to the class in that lecture the subject of the dictatorship of the proletariat?

The Witness: I didn't mention it at that lecture—

Mr. Isserman: Just a minute. First of all I wish to object to your Honor's question—

The Court: Mr. Isserman, I am not going to have any interference here. Now you will just go over there and sit down and then you can say what you want to say afterwards.

Now Mr. marshal, just escort Mr. Isserman over to the seat.

Mr. Isserman: I would like to make an objection to your Honor's question. Am I allowed to do it?

The Court: You have made it. Go back and sit down there.

(The marshal escorts Mr. Isserman to the seat.)

(Mr. Isserman rises.)

Mr. Isserman: Well, I rise now to object to your Honor's question.

The Court: Overruled.

(Mr. Isserman is seated.)

The Court: Now Mrs. Lightfoot, you will give me a direct and responsive answer to that question. In

—Tr. Tr. 11,273—

that lecture did you discuss the subject—did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Marshal, will you show Mr. Isserman to his seat?

Mr. Isserman: May I not stand at this point?

The Court: You will sit right down. I have had enough contemptuous conduct from you and I am not going to have any more.

Mr. Isserman: I am not aware of any contemptuous conduct.

The Court: Well, you will be aware, all right.

Mr. Isserman: I would like to object to your Honor's remark and I move for a mistrial because your Honor has made the defense impossible.

The Court: Mr. Marshal, get busy.

(Mr. Isserman sits down.)

The Court: (To witness) Now answer that question.

Mr. Isserman: I object to that.

The Court: Overruled.

The Witness: The question—may I hear the question again now; after so much I do not remember it.

The Court: The Reporter will read it—or I will ask you again:

—Tr. Tr. 11,274—

In that lecture did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

A. In the beginning of that—

The Court: All right, I sustain the objection to that question. We will have no more of it.

Go ahead with your next question, Mr. Isserman.

Mr. Isserman: May I stand up?

The Court: Yes.

(General laughter in the courtroom.)

The Marshal: Quiet, please.

The Court: Temporarily.

Mr. Isserman: I object to your Honor's remark.

The Court: Oh, I am not going to stand for any

more nonsense from you or from any of your colleagues, Mr. Isserman.

Mr. Isserman: It seems we are getting it and not your Honor.

The Court: Yes. Well, you are going to follow what I am going to say, make no mistake about it.

Mr. Gladstein: I assign your Honor's remarks as misconduct.

The Court: Very well.

—Tr. Tr. 11,275—

Mr. Gladstein: And that includes the badgering tone and the bullying and blustering tone towards the witness.

The Court: Oh, there is nothing about my tone that is at all noisy or loud.

Mr. Gladstein: No witness can retain composure and dignity under the attack which your Honor has just levied during the last half hour. I assign it as misconduct.

The Court: I consider what you said as absolutely contemptuous, Mr. Gladstein. Now you can keep it up all you want but you do it against my orders.

(Mr. McGohey rises.)

The Court: Yes, Mr. McGohey; do you desire to say something?

Mr. McGohey: I desire to say that certainly your Honor's tone was not loud; there was nothing that I observed in the nature of badgering, and I suggest that now we be allowed to go on with the trial.

The Court: Yes.

Mr. Isserman: And I object to Mr. McGohey's remarks as not being in accord with the facts.

Mr. Gladstein: I would like to say that they are directly contrary to the facts, and I am willing, if your Honor will permit, to have a poll taken of the members of the jury and the people of the press and

—Tr. Tr. 11,276—

the people in attendance in this courtroom at this moment as to—

The Court: Mr. Gladstein, you know earlier in this trial I found that no matter how much leeway I gave counsel they just tried to put the whole administration of justice into disrepute by just the sort of conduct that you are now indulging in, and I tell you now in the most emphatic way that I know, without raising my voice, that you are to desist from that. It is wholly improper, as you must know, to talk about having the people in the courtroom polled and having the jury polled as to whether a statement made by somebody is accurate or not. That is all right perhaps in some place but it is not right or proper in a courtroom, and you must know that, so please let the matter go on.

* * * * * *

—Tr. Tr. 11,281—

Q. At whose instance did you give that course? A. That was a course given—

The Court: Why don't you just give the person's name? Who was it that told you to give that course?

Mr. Gladstein: Well, your Honor, I object to that. It may not have been a person.

The Court: Overruled.

Mr. Gladstein: I don't think you should direct the witness that way.

The Court: Read the question to the witness, please, Mr. Reporter, and see if we can stop this circumlocution.

(Question read.)

A. This course was given—

The Court: Now, Mrs. Lightfoot, you are going to say at whose instance it was. That means giving the name.

Mr. Isserman: I want to object to that question.

Mr. Gladstein: I want to object to the Court making a direction to this witness and pointing his finger at the witness in an intimidating way. I assign that as misconduct, your Honor.

The Court: Mr. Gladstein, you are perfectly wonderful the way you make these things up.

Mr. Gladstein: I beg your pardon?

—Tr. Tr. 11,282—

The Court: Oh, you go ahead now.

Mr. Gladstein: Does your Honor deny that you—

Mr. McGohey: Oh, if the Court please, can't we get on with the trial and stop this nonsense?

The Court: I raised my finger, and the rest of it is sheer imagination but done deliberately. I know what you are up to, Mr. Gladstein. You and your colleagues here are trying, and again and again have made positively false statements in the record

for the purpose of making me appear to be biased and prejudiced and to do the wrong things, that I am not doing. However, I am not going to sit silently by and have you do that.

Mr. Gladstein: I deny that part of your Honor's statement which charges me with making false statements.

The Court: I happen to be in charge of this case and I happen to be in charge of this court.

Mr. Gladstein: I know, your Honor, but I wish the record to show that I deny that part of your Honor's statement that charges me or my colleagues with any false statements, and I not only agree with but affirm that part of your Honor's statement which is to the effect that your Honor is biased and prejudiced.

. . . . . .

—Tr. Tr. 11,406—

New York, August 4, 1949

. . . . . .

Q. Now will you tell us what Mr. Ross said in this opening statement concerning why this school was being held? A. Well—

Mr. McGohey: I object to that, your Honor.

The Court: Mr. Hall, is your answer going to involve the matter of policy of the Communist Party as to the rights of Negroes, the policy of the Party relative to youth and young people, the policy of the Party as to veterans, the policy of the Party as to

organized labor, the policy of the Party as to Spain and China, or any of those subjects?

—Tr. Tr. 11,407—

Mr. Isserman: I object to that question.

The Court: Overruled.

The Witness: As I recall, the—

The Court: No. Is your answer—do you want the question read so that you can tell a little better?

The Witness: If Mr. Crockett would give me that question.

The Court: No, Mr. Crockett won't give it to you. The reporter will give it to you.

The Reporter: Mr. Crockett's question?

The Court: Yes.

(Question read.)

The Court: Now, will that answer involve any of the things I have set forth?

The Witness: Well, I can answer if I am prevented from saying that, and leave that part out, as he said other things.

The Court: But he said some of those things?

The Witness: He said some of those things also.

The Court: So that that question, although one would not have guessed it, will involve if you answer it fully those other subjects that I have just referred to?

Mr. Isserman: I object to that question and to the Court's remark contained in it.

—Tr. Tr. 11,408—

The Court: Objection overruled.

The Witness: If I limit myself only to his opening remarks on why the school was set up, but it would not include that.

The Court: I will allow the question. You may answer it.

Mr. Crockett: That is what I contemplated, if the Court please, in asking the question.

The Court: But I thought I had better get it clear, and it seems from the colloquy that I have just had with the witness, it seems I did have the right impression.

Mr. Crockett: We spent considerable time—

The Court: Go ahead.

Mr. Crockett: May I complete my statement? I say I spent considerable time in the formulation of these questions so as not to violate any of the orders which your Honor has made.

The Court: Well, I am inclined to follow my own course to make sure that the trial is not unduly prolonged and that merely cumulative evidence is now averted.

You may answer, Mr. Witness.

* * * * *

—Tr. Tr. 11,410—

Q. Now, I believe you said that he also said something about the task and the difficulties which the Party faced in the South, is that right? A. That is correct.

Q. Now, can you tell us what he said about that, bearing in mind the Court's direction that if he said anything about Negroes in the South then that will not be admissible, so

that to the extent that we except the Negroes in the South you may answer?

The Court: How can you say that, Mr. Crockett?

Mr. Crockett: That is my understanding of it, your Honor.

The Court: That is not what I said at all, but you had better ask your questions but try to do it without misconstruing my direction.

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—Tr. Tr. 11,434—

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Mr. Crockett: May I ask the Court to reconsider the matter and be heard briefly before—

The Court: No; no, you may not be heard. I considered the paper before, and I have looked at it again here, and I need no enlightenment as to that.

Mr. Crockett: Does your Honor recall the circumstances under which you considered this paper?

—Tr. Tr. 11,435—

The Court: I cannot remember the exact witness and the exact page of the testimony, but I remember enough about it to tell you that I desire no argument now.

Mr. Crockett: I am wondering if your Honor recalls that at that time it was offered by the Government?

Mr. Gordon: No, no.

Mr. Crockett: Not offered, rather, but identified, and a foundation sought to be laid by the Government.

Mr. McGohey: If the Court please—

The Court: I sustained the objection. I am not going to get started on another one of these wrangles. Let us just quietly go on to the next question.

Mr. Crockett: I assure the Court that I am not in the habit, and I am not aware of anyone else being in the habit of wrangling. I just want to clearly indicate the basis on which I offer this exhibit.

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—Tr. Tr. 11,495—

(The following occurred at 4:10 p.m. in chambers):

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—Tr. Tr. 11,501—

The Court: Well, I thought I observed, when I found it necessary to call upon the marshals yesterday, I thought I observed some conduct by some of the defendants that struck me as rather spurring Mr. Gladstein and Mr. Isserman to remain standing longer than they should. You know, I see a good deal

—Tr. Tr. 11,502—

from my place on the bench there, and I try to keep myself quite alert, but I confess I could not quite hear what was said, but I had my eyes open, and I don't intend to have any more disorder in this case, if I can avoid it, and I intend to use all the powers at my command to prevent that.

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—Tr. Tr. 11,516—

Mr. Isserman: Without evaluating those at this time, I do want to make this point, that whatever I

did I take full responsibility for and no defendant had anything to do with it whatsoever.

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—Tr. Tr. 11,609—

New York, August 8, 1949

. . . . . .

Q. Well now, let me ask you if you didn't testify on Friday at page 11,543 as follows in answer to a question by Mr. Sacher concerning the use of these pages by you in your teaching: did you not say, "I pointed out how these pages helps us to understand of how it would be possible for us to proceed along this path toward social-

—Tr. Tr. 11,610—

ism"? A. That is correct, sir.

Q. Very well. And you were referring to these pages 33 through 37 of Defendants' Exhibit 9 x Z? A. That is true, sir.

Q. I am reading from page 34—

The Court: What the witness is doing is looking at that paragraph, first full paragraph on page 20, to see if it is not word for word just as you read it from the outline.

Mr. McGohey: That is what I was about to say.

Q. Now, reading, "From a study of the objective processes of capitalism in their development and decline, the theory of Marxism arrives at the conclusion that the fall of the bourgeoisie and the seizure of power by the proletariat, and the replacement of capitalism by socialism are inevitable. Proletarian strategy may be considered truly

Marxist only when it makes this fundamental conclusion of the theory of Marxism the basis of its operations."

Isn't that word for word in that book? A. Yes, sir.

Mr. Sacher: But may I, your Honor, point out something that is in the record?

The Court: No, I am not going to have any interference with cross-examination, Mr. Sacher.

Mr. Sacher: But I submit this is misleading, your

—Tr. Tr. 11,611—

Honor.

The Court: Well, you will please cease making comments at this time, Mr. Sacher. I am determined to put a stop to that, and I shall.

Mr. McGohey: If the Court please, I offer that paragraph, the first full paragraph of page 20, in evidence.

Mr. Sacher: I would like to be heard in support of an objection, if I may, your Honor.

The Court: I don't want any argument on this. You object, do you?

Mr. Sacher: I do. I would like to point something out to your Honor that is true of the thing—

The Court: No, I don't want to hear anything on that.

Mr. Sacher: —that is offered—

The Court: I am too familiar with your methods.

Mr. Sacher: But there is nothing to be familiar about. I wish to point out something.

The Court: All you have to do is let the matter rest. You have objected and I have overruled your objection, and that is the end of the matter.

—Tr. Tr. 11 818—

New York, August 10, 1949.

* * * * *

Q. Mr. Thompson, at the 1945 convention the Communist Party reconstituted itself upon the basis of the principles of Marxism-Leninism. Will you state to this jury what is Marxism-Leninism?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Gladstein: May I call your Honor's attention to the state of the record—

The Court: No, I don't want to hear any argument about it.

Mr. Gladstein: But, your Honor—

The Court: I will hear what this witness directed to be taught, resolutions that he voted for setting up

—Tr. Tr. 11,819—

the schools and what was to be taught in the schools, and when the time comes, if it does, for him to testify what he taught and in particular schools, within certain limitations I will permit. I do not conceive the question before us to be one which makes that question relevant.

Mr. Gladstein: Would your Honor notice that in the record your Honor permitted the witness Budenz to be asked precisely that question and to give an answer to it?

The Court: You know, I just told you I didn't desire to hear argument but you wanted to get that

point in and so again you have become contemptuous. Go ahead.

Mr. Gladstein: May I ask the witness the very same question that Mr. McGohey asked, your Honor?

The Court: I tell you, Mr. Gladstein, again, I do not desire to hear argument.

Mr. Gladstein: I do not want to argue but I am asking permission—

The Court: No, you are arguing, and you are again contemptuous.

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—Tr. Tr. 12,084—

New York, August 12, 1949

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Mr. Gladstein: I imagine the sentence has sentences before it and sentences afterward to make clear what the author is doing. It is quite different from—

The Court: Do you remember what I said about arguing—

Mr. Gladstein: —Mr. Gordon asking—

The Court: Mr. Gladstein, you are placing yourself in contempt again by arguing without my leave.

Mr. Gladstein: I am sorry. I didn't mean to do that, your Honor.

• • • • •

—Tr. Tr. 12,129—

New York, August 15, 1949

* * * * *

Q. Mr. Johnson, are you a veteran of any war?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Have you received any awards from the United States Government?

Mr. Gordon: Objection?
The Court: Sustained.

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—Tr. Tr. 12,132—

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Q. What was the approximate membership of the Communist Party in New York County between January 1946 and July 20, 1948?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Is the membership of the Communist Party, or was the membership of the Communist Party in New York County between January 1946 and July 20, 1948, the largest in any county in the State of New York?

Mr. Gordon: Objection.
The Court: Sustained.

Q. As chairman of the New York County Education Committee, was it a part of your responsibilities to arrange the agenda for the meetings of the Committee?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Did you in your capacity as chairman of the New York County Education Committee in the period January 1946 to July 20, 1948, arrange the agenda for the meetings of the Committee? A. Yes, I did.

Q. And did you preside over those meetings? A. Yes, I did.

Q. And did you carry out or supervise the carrying out

—Tr. Tr. 12,133—

of the Committee's decisions? A. Yes, I did.

Q. Can you tell us how frequently the New York County Education Committee met during the period January 1946 to July 1948?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Did the New York County Education Committee hold meetings between the period January 1946 and July 20, 1948?

Mr. Gordon: Objection.
The Court: Sustained.
Get down to business, Mr. Crockett.
Mr. Crockett: I am trying to get this preliminary information established, your Honor.

The Court: Well, get right to work. If there is some particular meeting, get to it.

Q. Did you attend the meetings of the New York County Education Committee between January 1946 and July 1948?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Where were the meetings of the County Education Committee held in the period January 1946 to July 20, 1948?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Can you tell us what the educational activities of the New York County Education Committee were between

—Tr. Tr. 12,134—

January 1946 and July 20, 1948?

Mr. Gordon: Objection.
The Court Sustained.
These generalities are out, Mr. Crockett. You must realize that now.

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—Tr. Tr. 12,260—

New York, August 16, 1949

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Q. Is that located in Manhattan? A. Yes, it is.

Q. In what section of Manhattan? A. In what is popularly known as Sugar Hill. It is around 145th Street and St. Nicholas Avenue.

Q. And was the Freedom Road Club—by the way, did you have anything to do with the selection of that name for the club? A. Well, yes. I participated in the club discussion. We based it on the book by Howard Fast which—

Mr. Gordon: Well, I object to this. I thought he was going to say yes or no, your Honor, and it would simplify it.

The Court: I think that is an assumption you ought not to make.

Mr. Gordon: I object to it.

The Court: I sustain the objection.

Q. Is the Freedom Road Club a part of any section in the Communist Party? A. Yes. It was at that time a part of the Harlem Division of the Communist Party.

Q. Now, from your experience as county education director during that period, and using as an example your own club, the Freedom Road Club, will you tell us what the educational structure or apparatus of the Communist Party is on the club level?

Mr. Gordon: Objection.

The Court: Sustained.

—Tr. Tr. 12,261—

Q. What educational officers are there in the Communist Party clubs? A. Generally, the club has the educational director, a literature director, and a press director. According to the size of the club, those three officers may be combined in one person.

Q. Now, are the press director and the literature director assistants to the educational director of the club?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Now, what are the duties of an educational director of the Communist Party club?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Is there also an educational director of a section? A. Yes, sections generally have educational directors.

Q. Do sections also have educational committees? A. Yes, they do.

Q. Are those committees elected or appointed?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Are the educational directors of clubs in a section members of the section education committee?

Mr. Gordon: Objection.
The Court: Sustained.

—Tr. Tr. 12,262—

Q. I believe you mentioned yesterday in your testimony that the General Education Department of the Party's educational work also supervised the educational discussions in Communist Party clubs, and that you also had periodic examinations to see what was being discussed in the clubs and to criticize any variations from what the Party felt was the Party's policy in those discussions; is that right?

Mr. Gordon: Objection.

The Court: Sustained.

Why don't you get down to work, Mr. Crockett, instead of all this fooling around, repetition?

Mr. Crockett: I must disagree with your Honor's statement that it is repetitious.

The Court: All right. This case is going to move now. I told you so. I am not going to have all this repetition going on ad infinitum.

Mr. Crockett: I am as anxious as the Court is for the case to move.

The Court: All right, do as you choose.

Mr. Crockett: But I am trying to lay a foundation for bringing out certain information.

The Court: You do not have to lay a foundation for proving the same thing a half dozen times and repeating it and repeating it. Now go ahead.

Q. Can you tell us, Mr. Johnson, what is the educational

—Tr. Tr. 12,263—

structure of the Communist Party beginning with the clubs and moving up to the National Committee, the National Education Committee?

Mr. Gordon: Objection.

The Court: Sustained. I just sustained an objection to that same question three minutes ago.

Mr. Crockett: I must respectfully disagree with the Court. That is the first time I put that question. The former question had to do with the apparatus on the club levels and on the section levels.

The Court: Well, maybe there has been some little change, but we have had so much about that that there can't be any doubt in anybody's mind.

Mr. Crockett: There has been no witness presented by the defense who discussed the structure.

The Court: Yes, you have had other witnesses by the defense testifying at great length and on the same subject. Now come down to some specific thing you want to prove.

Mr. Crockett: I recall the witness Meyer, who was called by the prosecution, was permitted to give what he considered the over-all educational structure of the Party.

The Court: I don't want any argument, Mr. Crockett. Please go ahead.

Q. Do you know, Mr. Johnson, approximately how many —Tr. Tr. 12,264— Party clubs there were in New York County in the period January 1946 to July 20, 1948? A. It varied during that period from about 440 clubs to—over four or five hundred.

The Court: 440 to 500?

The Witness: From 400 to 500.

The Court: From 400 to 500?
The Witness: Yes.

Q. Now, approximately how frequently do clubs meet in the New York County area?

Mr. Gordon: Objection.
The Court: Sustained.

Q. How often did your club meet?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Was there generally a discussion period conducted as a part of the club meeting?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Did you in your capacity as county education director, or as a member of the County Education Committee ever recommend any material to any of these clubs for discussion?

Mr. Gordon: Objection.
The Court: Sustained.

Q. What, if any, supervision by the County Education Committee during the period that I have referred to ex-

—Tr. Tr. 12,265—

ercise over the subject matter that was being discussed in the Communist Party clubs in New York County?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Was there any machinery, Mr. Johnson, by which the County Education Committee could keep abreast of what was being discussed in the various Party clubs in the New York area during the period January 1946 to July 20, 1948?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Was there any requirement that each club of the Communist Party in New York County during the period that I have just referred to make periodic reports to the County Education Committee or to the County Education Director?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Did the clubs in New York County in the period that I have referred to make reports to their Section Education Department concerning the discussions being conducted by those clubs during that period?

Mr. Gordon: Objection.
The Court: Sustained.

Q. Do you recall any meetings of section education directors with you or with the New York County Education

Committee in the period January 1946 to July 20, 1948, at

which reports were received concerning discussions in Communist Party clubs?

Mr. Gordon: Objection.

The Court: Sustained.

Q. Do you recall any such periods at which reports were made, and if so, by whom and when?

Mr. Gordon: Objection.

The Court: Sustained. Better get down to cases. The generalities are over.

Mr. Crockett: I can't understand the Court's last remark about getting down to cases.

The Court: Well, if you read the record you will find that most of the material you have just been talking about are all in there by this same witness. Now, if you have some specific thing get to it instead of these generalities. I tried to make that clear but evidently without much success.

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—Tr. Tr. 12,321—

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Q. Did you and Mr. Gates serve in the same outfit overseas?

Mr. Gordon: Objection.

A. No, we did not.

The Court: Sustained. Strike out the answer.

. . . . . .

—Tr. Tr. 12,322—

Q. And how long have you known Mr. Dennis? A. I have known of Mr. Dennis's work for the past ten or eleven years, and I have known him personally since I returned from the Army.

The Court: Since what?

The Witness: Since I returned from the Army.

The Court: Strike that out.

Q. Do you know the defendant—

The Court: Don't you know I have sustained objections to that, and you are doing what so many other witnesses do: the minute I sustain an objection to something you make some excuse to bring it in. Now, that is out of the case.

Mr. Crockett: Your Honor, it struck me that that came out very naturally. A person who has been in the Army—

—Tr. Tr. 12,323—

The Court: Well, it did not strike me that way, Mr. Crockett. This is the second time. You see the first, only a moment ago, was the voluntary statement of something about serving with Mr. Gates, the only purport of which could have been to bring out that he was in the Army. Now, I sustained an objection to the question and that isn't in the case.* It makes no difference here whether this witness was in the Army, or was not in the Army. Now, let us just try to follow the rulings here and not this

* See *supra*, printed page 655a, Tr. Tr. 12,129.

continual frustration of them that we have had here. If I were stupid and did not notice it, why, it might be one thing, but I see it every time.

Mr. Crockett: I respectfully object to the Court's remarks which imply that there had been any attempt to frustrate any rulings on the part of myself, or my colleagues.

Q. Mr. Johnson—

The Court: Well, there certainly has been, and I do not want to have the record in the slightest degree doubtful about that. You and your colleagues have been doing plenty.

Mr. Crockett: It seems as though we have the right to express an opinion.

. . . . . .

—Tr. Tr. 12,353—

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Q. Now, is it your testimony, then, that anyone who talks about revolution as meaning violence is foolish? A. I agree with the way in which it was put by Judge Sherwin in this court in Maryland who just ruled the Ober Bill unconstitutional. He stated—

Q. Mr. Johnson, please— A. (Continning) He stated that—

Q. Mr. Johnson, please—

Mr. Gladstein: Just a moment. I object to the interference with the witness's testimony. I also object

—Tr. Tr. 12,354—

to the tone and manner which Mr. Gordon has adopted, and I again now ask the Court to admonish Mr. Gordon so he will behave as a counselor at law ought to.

Mr. Gordon: Would your Honor admonish Mr. Gladstein—

The Court: Well, I don't feel in the mood to admonish anybody. But it seems to me perfectly evident what the question was that was asked, and he proceeds to say something that is absolutely not responsive. Now I do not see how anybody can contend that it is, but let us not waste time on that. Let us have the question put to the witness again.

Mr. Gordon: Let me reframe it.

Q. Did you in discussing the matter with the teachers or in any of your teaching ever give to the students any discussion or definition of revolution as it may appear in the Marxist-Leninist classics?

Mr. Crockett: I object, your Honor, unless Mr. Gordon is specifying some particular classic by some particular author.

The Court: I think he will get around to it in a minute. Overruled.

Mr. Crockett: I thought we were not having these general questions, though.

—Tr. Tr. 12,355—

The Court: Well, you see, I get the import of what you say. You are just trying to make it appear, perhaps for the benefit of the spectators, that

Broms—Redirect
Colloquy

I ruled one way this morning as to your general questions and that I am so prejudiced and biased that I ruled just the opposite on similar questions put by Mr. Gordon. Now, you know there is nothing in that. These questions are put on cross-examination here and they are perfectly proper, and I suggest that those little ironical insinuations be omitted.

Go ahead, Mr. Gordon.

Mr. Crockett: I want to object to the Court's reference that whenever I get up to speak I am speaking for the spectators. I register my objection to the—

The Court: Well, I don't think you do it whenever you get up.

. . . . . .

—Tr. Tr. 12,536—

New York, August 17, 1949

. . . . . .

Q. Why did you come here? A. To study music.

Mr. McGohey: Objection.

The Court: Sustained, sustained; no more of those whys; then we are good for two hours.

—Tr. Tr. 12,537—

Mr. Gladstein: But he just answered in one sentence.

The Court: No, sir.

Mr. Gladstein: But he did.

Mr. McGohey: Well, if there is an answer I move that he stricken, even though there was one word.

The Court: Well, I did not hear it, but I will strike out the answer. There will be no more of those whys, hows and "under what circumstances"—no more of that.

Q. Mr. Broms, did you come to New York for any reason connected with your membership in the Communist Party or for any other reason?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you come to New York City to study voice?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Are you a student of music?

Mr. McGohey: Objection.
The Court: Sustained

Q. What has your occupation been since 1946 when you came to New York?

Mr. McGohey: Objection.
The Court: Sustained.

—Tr. Tr. 12,537-A—

Q. Are you a professional singer?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. Gladstein: In view of the questions on cross, your Honor sustains the objections?

The Court: I don't want any argument, Mr. Gladstein. You start it so easily.

—Tr. Tr. 12,538—

Mr. Gladstein: It is no argument; it is just amazement that I am expressing.

The Court: I know, but I wouldn't express the amazement too forcibly.

Q. Where were you between April 1941 and September 1945?

Mr. McGohey: Objection.

The Court: Sustained. He has already indicated.

Q. You have an honorable discharge from the United States Army?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you serve overseas?

Mr. McGohey: Objection.

The Court: You know, Mr. Gladstein, this type of question that you have been asking here is the type that I have explicitly told you that I was not going to permit any more. Now this man is not a defendant. These matters have nothing to do with the case, and I think when you hear me rule half a dozen times it would be well, if you can do it, to just follow the indication of my rulings instead of keep plugging away, to perhaps leave some impression

that the subject matter of your questions is a matter of fact.

Mr. Gladstein: Your Honor, may I point out that

—Tr. Tr. 12,539—

I am seeking this testimony on redirect after there has been a cross-examination which raises a question—

The Court: Yes, I am quite aware of that. I don't want to argue any further about it.

Mr. Gladstein: My point is there is a difference between offering this on direct and offering it on redirect.

The Court: I realize it but I see nothing in the cross-examination to warrant these inquiries.

Mr. Gladstein: May I make an offer of proof?

The Court: No.

Mr. McGohey: I object to that.

The Court: We are not going to have any more offers of proof.

Mr. Gladstein: Well, I would like to have the record show that I desire to make—

The Court: You may do so.

Mr. Gladstein: —an offer of proof, and the citation—

The Court: You know, I have said before when you asked a question—

Mr. Gladstein: —and—

Mr. McGohey: Just a minute. Did your Honor hear what he said?

The Court: Well, I did not hear what he said.

Mr. McGohey: After your Honor has twice said

—Tr. Tr. 12,540—

he won't have an offer of proof, then Mr. Gladstein said he wants to make an offer of proof and states—and he makes in his statement the circumstances and the fact that he wants to bring out. It is a direct violation.

The Court: Well, I think if you did that, Mr. Gladstein, it is very wrong, and it just adds to the accumulation of things you have done here contrary to my direction; but let us drop it there.

* * * * *

—Tr. Tr. 12,566—

New York, August 18, 1949

Mr. Isserman: It is directly relevant to the issues in this case, and it is a matter of direct refutation, if the Court please.

The Court: You want to prove they threw Budenz out?

Mr. Isserman: No, we want to prove a change in duties and taking away many duties from Mr. Budenz which this witness took over.

The Court: Did Mr. Budenz testify that this was not so?

Mr. Isserman: Mr. Budenz testified he performed certain duties which are included in the duties which this witness took over and which Mr. Budenz did not perform.

The Court: Let me see the page. If it is something that Budenz testified that you desire to refute, I will allow it.

Mr. McGohey: And I suggest, your Honor, that you remind counsel that there is a way to do it, not this way.

The Court: I asked for the page, Mr. Isserman.

Mr. Isserman: Page 1403, page 1405—

The Court: Wait a minute.

Mr. Isserman: Pages 1403, 1404 and 1405 are the pages I am referring to at this moment.

The Court: Now, if you will just pause for a mo-

—Tr. Tr. 12,567—

ment until I glance at them. (Examining.)

Mr. Isserman: There is also considerable matter on cross-examination with reference to Mr. Budenz's duties.

Mr. McGohey: Now, if the Court please—

The Court: If you have another page you desire to refer me to just find it. I find nothing on pages 1403 to 1405 which bears upon it.

Mr. Isserman: There is discussion of supervision and duties in connection with—

The Court: No, I don't want argument on it, Mr. Isserman. I want the other page that you have reference to.

Mr. Isserman: I refer to page—well, specifically on 1405, if the Court please, there is reference to—

The Court: I don't want argument on it, Mr. Isserman. I have read those pages.

Mr. Isserman: May I call attention to the testimony on the telephone?

The Court: No. I have just read it.

Mr. Isserman: There is a reference to duties on 1835 of the transcript.

The Court: 1835? Just a moment. (Examining.)
I sustain the objection. Pass on to something different.

—Tr. Tr. 12,568—

By Mr. Isserman:

Q. Before November 1942 will you tell me where Mr. Budenz's office was located?

Mr. McGohey: Objection.
The Court: Sustained.

Q. I call your attention to the following testimony of Mr. Budenz, page 1405—

The Court: Mr. Isserman, I will not permit you to read it, because I take it it is a way of circumventing my direction that there be no argument on it. I have read those pages. You just referred me to them. Go on to something else.

Mr. Isserman: Do I understand your Honor's ruling that I may ask no questions on matter contained on pages 1403—

The Court: No—

Mr. Isserman: —1404 and 1405 of the transcript?

The Court: —I am ruling just the opposite. I am ruling that the incident that you are trying to put in evidence here does not controvert what appears on those pages, and I am not going to allow you to go into that subject any further.

Mr. Isserman: I am going on to the specific refutation of the matter on that page.

The Court: Well, I know you pretty well by now,

—Tr. Tr. 12,569—

Mr. Isserman, and I suspect you say that but it will turn out to be this same incident, and that incident is not going in.

Mr. Isserman: I object to your Honor's remark with respect to my intention.

The Court: All right.

Mr. Isserman: May I not read any portion of pages 1403, 1404 and 1405? Your Honor directs me—

The Court: You may not read them now. You will pass on to some other subject now.

Mr. Isserman: May I object to your Honor's ruling?

The Court: You may.

Mr. Isserman: Will your Honor advise me as to when I may refer to those pages?

The Court: No.

Mr. Isserman: My order of examination requires that I do it now, if the Court please.

May I do it now?

The Court: That is just one of those things that you want to do and you are not going to do. Now go ahead.

Mr. Isserman: Well, I would like some direction from the Court as to when I will be allowed to ask questions on those three pages. May I have such direction?

—Tr. Tr. 12,570—

The Court: You are not going to get any further

direction, and I am not going to get into a wrangle with you. If you keep this up I will take some steps to make you either go ahead or withdraw this witness.

Mr. Isserman: I object to your Honor's remarks and will proceed as directed, over objection.

The Court: That is good judgment.

Mr. Isserman: I object to that remark.

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—Tr. Tr. 12,615—

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Defendant Dennis: I think it should be clear to everyone present—

The Court: Well, I am the one that is important. Don't worry about the spectators.

Defendant Dennis: I include your Honor, of course —that what is now raised in the court is not some secondary or minor technical point of law. The proposition which is being advanced here is one which, in effect, can only be considered to disrupt and throttle the defense or to compel the defense

—Tr. Tr. 12,616—

and witnesses whom we produce to become instruments of the prosecution, and otherwise it is being inferred that we would be prevented from presenting our evidence on our case. I think should be clearly grasped. We have been prevented from fully and adequately—by various rulings of the Court, from presenting fully what we advocate, what we teach, and bringing out—

The Court: How can you say that when witness after witness is put on and refuses to answer this question, refuses to answer that question; then you say you are prevented from fully developing your defense. It seems to me ridiculous.

Defendant Dennis: We have been prevented also from bringing out fully the real issues in the trial, the efforts to surpress the political rights of an American working class party and with it the Bill of Rights.

The Court: Well don't change the subject now.

Defendant Dennis: And now there are limitations of the severest kind being placed even on our right and obligation to rebut testimony which has been introduced by false witnesses in behalf of the prosecution, and I think—

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—Tr. Tr. 12,724—

New York, August 19, 1949

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Mr. Isserman: May I make a statement in respect to this?

The Court: I don't require any, Mr. Isserman.

Mr. Isserman: I would like to make one if the Court will permit me to make one.

The Court: I don't desire to hear any; I think I am pretty familiar with the record as to this phase of the case.

Mr. Isserman: This is not a matter of record.

This is a matter of some new evidence, if the Court please.

The Court: Well, I can tell from your questions what you are trying to prove, I think.

Mr. Isserman: May I state what I am trying to prove?

The Court: No, I don't want to hear any more of these offers of proof.

Q. At this particular meeting concerning which you have just testified, will you tell us what the subject of the discussion was?

Mr. McGohey: Objection.

—Tr. Tr. 12,725—

The Court: Sustained.

Mr. Isserman: May I have a moment, please?

The Court: Yes.

(Mr. Isserman confers with Defendant Dennis.)

The Court: If you desire to call my attention to some portion of the record where some witnesses on behalf of the Government testified to something which you are now attempting to refute, I will permit a reference to the page of the record.

Mr. Isserman: This is not a matter of refutation—

The Court: Very well.

Mr. Isserman: —but it is evidence on another point.

Mr. Sacher: May I inquire whether you won't receive evidence on motivation? That is what the purpose of this testimony is, your Honor.

The Court: Well, I suppose when I tell one of you not to make a statement the other gets up and makes it. I don't desire to say anything further about it and I don't want any argument.

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—Tr. Tr. 12,809—

New York, August 22, 1949

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Mr. Isserman: I object to that question.

The Court: Overruled.

Now, Mr. Isserman, once in a while, I think about every fourth objection, you might rise from your seat in the customary way.

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—Tr. Tr. 12,822—

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Mr. Sacher: Now, if the Court please, I don't understand where I am. Budenz was permitted to testify—

The Court: Now I don't want any argument, Mr. Sacher. I have made certain rulings here that are very explicit and clear. If you have read the record you must know them. If you have read the record

and you don't remember them that is not my fault.

Mr. Sacher: But I fixed the time; I fixed the place now—

The Court: I don't want argument. I will not have it, Mr. Sacher. You ask your questions. If there is some part of the Government proof that you are about to try to rebut, you better get right down to it and be specific.

—Tr. Tr. 12,823—

Mr. Sacher: Is it necessary that I must point it out on the record when I want to rebut it?

The Court: The question must be clear to me if its relevancy is such that I may allow it. These generalities—

Mr. Sacher: Well, I must confess, your Honor, this is the first time I have ever had to practice that way.

The Court: Don't become impertinent, Mr. Sacher.

Mr. Sacher: It is a statement of fact. There is nothing impertinent about it, sir.

The Court: There is something impertinent about it. It is deliberately contemptuous and I so find.

Mr. Sacher: I object to your Honor's finding. I find nothing contemptuous in it, and I respectfully ask the Court to give me a moment—

The Court: Please be silent, Mr. Sacher. As to these comments, please stop that.

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—Tr. Tr. 12,851—

Q. How long prior to the adoption of the constitution had you been a member of the Communist Party?

Mr. McGohey: Objection.
The Court: Sustained.

Q. In the language addressed to Mr Budenz, Dr. Aptheker, I draw your attention to the first sentence of the second paragraph of the preamble of the constitution as it appears on page 3 of Government's Exhibit 26 in evidence, and I ask you if it does not read as follows:

> "The Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties."

It reads that way, does it not? A. Yes, sir.

Q. Now I ask you in the language put to Mr. Budenz, what was the meaning of "reactionary enemies" to you and those who were working with you at that time in the Communist Party?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. Sacher: Will your Honor excuse me just a moment, please?
The Court: Yes.

(Mr. Sacher confers with counsel.)

—Tr. Tr. 12,852—

Q. Dr. Aptheker, did you in the year 1938 write a book called "Negro and the Civil War"?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you in 1939 write the book called "Negro Slavery Votes in the United States 1526 to 1860"?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you in 1940 write a book entitled "The Negro in the American Revolution"?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you in 1941 write a book entitled "The Negro in the Abolitionists Movement"?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you in 1945 write a book entitled "Essays in the History of the American Negro People"?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you in 1948 prior to July 20th, write a book entitled "To Be Free. Studies in American Negro History."

Mr. McGohey: Objection.
The Court: Sustained. You better get down to cases pretty soon, Mr. Sacher.

—Tr. Tr. 12,853—

Q. Did those books embody the teachings of Marxism-Leninism?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you use the books which I have mentioned in your teachings in Communist Party schools?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. Sacher: In view of your Honor's rulings I find it utterly impossible to lay before the jury the teachings of the Communist Party in regard to important matters concerning which the witness Budenz was interrogated and was permitted to testify, and in those circumstances I find it impossible to proceed with the further examination of this witness.

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—Tr. Tr. 12,873—

By the Court:

Q. Now, I have a sort of a recollection that there was something in the Manifesto that said, "Of course what I am saying here does not apply to Great Britain and America." Do you remember such a thing as that? A. I don't remember, your Honor.

Q. Am I wrong about that, or was there some other paper? I have a recollection of somebody producing the book or pamphlet here in which in substance the writer said, "Now, all these rules about the dictatorship of the proletariat, and

sion, they apply to these European countries, but they do not apply to Great Britain and America." You do not have any recollection of anything like that? A. No, your Honor, I have not.

Q. I thought that was the origin of this American exceptionalism, that somebody had said they were different, and there was proof in the case here that while somebody did say they were different, along came some other people later and said, "Oh, no, there is no real difference; it is just like all the rest of them." You don't remember anything like that? A. No.

Q. All right. A. I remember this much. I remember that the laws governing social development apply in America just the same as the laws of physics and chemistry.

Q. Yes, that is what they say now. But the question I

—Tr. Tr. 12,874—

asked was whether there was not a time in one of these books where somebody had indicated that at that time it was different. Now let me just look a little bit. A. I would like to differentiate, your Honor, though, between a law of social development and a conclusion such as the dictatorship of the proletariat.

Q. Well, you already drew that differentiation. That was the purport of your answer to the question. You know, I am smart; I catch onto those things. I saw that right away.

Mr. McGohey: Does your Honor have State and Revolution, Exhibit 53?

The Court: State and Revolution?

Mr. McGohey: Foundations of Leninism, rather.

The Court: Yes, I have it.

Mr. McGohey: I suggest your Honor turn to page 56.

The Court: Exhibit 33, Foundations of Leninism?

Mr. McGohey: Yes.

The Court: Page 56?

Mr. McGohey: Yes. I think that is what your Honor is referring to—Your Honor, I am misleading you. It is 55 and 56.

The Court: Yes, that is just it, "Marx's qualifying phrase."

—Tr. Tr. 12,875—

Now, where is that qualifying phrase? Marx says "for every real people's revolution on the Continent." And so in this Foundations of Leninism by Joseph Stalin, he says:

"Marx's qualifying phrase about the Continent gave the opportunists and Mensheviks of all countries a pretext for proclaiming that Marx had thus conceded the possibility of the peaceful evolution of bourgeois democracy into a proletarian democracy, at least in certain countries outside the European continent (England, America)."

Now, you remember all about that, don't you?

The Witness: I remember having read this passage.

The Court: But as you testified, that has nothing to do with American exceptionalism, does it?

The Witness: Well, I would not say that has nothing to do with American exceptionalism.

The Court: Well, maybe it is American exceptionalism in its essence.

Mr. Crockett: Maybe I can help your Honor by asking the witness to explain what, if any, connection this has to do with his understanding of American exceptionalism.

The Court: Well, is that American exceptionalism, even that part right there that you have before you

—Tr. Tr. 12,876—

in that book?

The Witness: Well, what the writer here is pointing out is that certain theoreticians have taken Marxist's qualifying statement or phrase and they have blown it into a theory of exceptionalism. That is what he says.

The Court: And that is Joseph Stalin that is saying that.

The Witness: All right. That is what he says.

The Court: That ought to make it so, oughtn't it?

The Witness: Well, your Honor,—

The Court: All right.

Mr. Sacher I wish to object to your Honor's method of interrogation and the observation that you made and the tone in which you made it.

The Court: Very well, Mr. Sacher, you have in a deliberately false manner stated something about my conduct, and I will not permit you to do it ever without making it clear that it is a false and completely wrong statement. There was nothing in my manner, nothing in my tone, no gesture or anything that I did that could possibly warrant that comment of yours.

—Tr. Tr. 12,891—

Q. I notice that section refers, Mr. Berry, to American democracy and on several occasions the Court has inquired what the Communists meant by democracy. I ask you to tell us what the Communists mean by democracy?

Mr. McGohey: Objection.

The Court: I will allow it.

A. Well, the best illustration I could give, Mr. Crockett to that is the program of the Communist Party on the Negro question.

Now you will note, and I think it is pretty well known, that the Communist Party program—

Mr. McGohey: If the Court please—

The Court: Yes, I am afraid I made a mistake.

Mr. McGohey: On the basis of the answer so far this can't be a definition.

The Court: No. It is like that "American exceptionalism." Instead of getting a definition we get into a long discussion.

Now you can define what the Communists' understanding is of democracy without going into all these illustrations, I am very sure, and why don't you just try to do that?

Mr. Crockett: And maybe I should inform you,

—Tr. Tr. 12,892—

Mr. Berry, that the Court has already ruled that it does not desire to hear any more testimony about Negroes, and realizing that you are a Negro—

Berry—Direct
Colloquy

The Court: I did not say I did not want to hear any more testimony about Negroes—

Mr. Crockett: I thought your Honor has ruled—

The Court: What I said was that I did not want to have any more testimony about what I called peripheral issues, which includes the grievances of veterans and what the Communists are going to do for them; it includes housewives; it includes a great variety of other subjects besides the question of lynchings and Jim Crowism and all that sort of business. And I said as to them, those peripheral issues have been gone over again and again here, that the position of the Communist Party and of these defendants is most explicit and I did not want any more repetition on it. That is what I said.

Mr. Crockett: I might point out—

The Court: I did not say I did not want any more testimony about Negroes and I can't imagine why you said such a thing.

Mr. Crockett: On the contrary, my reading of the transcript, as well as my ears, tell me that, having sat through days of the trial, your Honor has said you did not want to hear any more testimony about

—Tr. Tr. 12,893—

the Negro question.

The Court: Well, you see there is something different between the Negro question and any testimony about Negroes.

Mr. Crockett: Your Honor, I just can't talk about Negroes without—

The Court: Now I do not want to argue with you,

Mr. Crockett. If this witness is going to give a definition of what Communists meant by democracy in the ordinary way that people give definitions, I will allow it. If he wants to go on by illustrations and make what is substantially an address on the subject, I shall not have it. Now you must make up your mind.

Now, Mr. Berry, don't you think you can tell us and give us the definition of democracy as understood by the Communists and in the Communist Party without going into a long statement with illustrations?

The Witness: I will attempt it, your Honor.

The Court: Well, you see here I do not want—

The Witness: I think I can do it.

The Court: —to seem unkind about things; and I do not like to shut off people when they start explaining something. And if you can do it by giving a definition and do it briefly, I will be very glad to let you do it. Now don't you think you can do that?

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—Tr. Tr. 13,084—

New York, August 25, 1949

By Mr. Gladstein:

Q. Those stick in your mind and the others you are not sure of, is that what you wish to say?

Mr. McGohey: Objection. That is not what he said.

Mr. Gladstein: Well, I am asking him.

The Court: Don't you think you might better allow him give his best explanation?

Mr. McGohey: I object to the form of the question.

Mr. Gladstein: Your Honor said he couldn't, and that is why I asked the question.

Mr. McGohey: I object to the form of the question.

The Court: Well,—

Mr. Gladstein: I will withdraw it.

The Court: I will ask him myself.

By the Court:

Q. Give your own explanation in your own way and what you're explaining to us is how it comes about that you can remember that at these three meetings on three successive

—Tr. Tr. 13,085—

Fridays in June and July, 1945, when the sessions were from nine to one each of those days, that there was there on each occasion yourself, Budenz, Stachel, Max, Starobin and Allen, but although there were about 60 there in all, all of whom must have been there, or some of them at least, pretty well known to you, you can't remember any one of the rest of them. That is what you're explaining. A. Yes, and I appreciate the opportunity of explaining.

Q. Go ahead and do it. A. The staff of the Daily Worker is a large staff; that is, approximately 60 people, 60 present at these meetings, and staff meetings of the Daily Worker were held on many other occasions.

It is very difficult to separate in one's mind the people who were present at one specific occasion or another specific occasion unless there were unusual circumstances

attached to the participation of the individuals in one or another meeting.

Now, there were unusual circumstances attached to these three meetings. The fact that Budenz was chairman I recall because he was chairman.

I recall the presence of Alan Max because it was he who as the effective managing editor of the paper was responsible for arranging the meetings of the editorial board.

—Tr. Tr. 13,086—

I recall distinctly the presence of Mr. Allen and Mr. Stachel because the discussion that developed between them was one on which other speakers, including myself, commented in the course of the discussion. They were, as it were, principals in the discussion in the sense that the issue that they raised became focuses of the discussion.

I remember the presence of Mr. Starobin, because on each of the three occasions, following each of the three occasions I discussed the contents of the meetings with him at lunch.

I don't recall the specific individuals present other than these, because it is impossible to make a separation between people who were present at one meeting or another unless there are these unusual circumstances.

Q. Now, all these 60 per cents, or whatever the numbers were, were members of the staff, weren't they? A. (No answer.)

Q. I think you just said so. A. I believe they were. I couldn't—

Q. Well, that is your best recollection? A. It was called a staff meeting.

Q. But I say that is your best recollection? A. I didn't—

Q. You said so a moment ago. Do you want to take it

—Tr. Tr. 13,087—

back now? A. No.

Sillen—Cross
Colloquy

Mr. Gladstein: Just a moment. I object to the way your Honor is doing that.

The Court: Overruled.

Mr. Gladstein: Let the witness speak.

The Court: Oh, I will let him speak, Mr. Gladstein.

Mr. Gladstein: No, you have not, your Honor.

The Court: Do you want to give him a little time to think?

Do you desire more time to think?

Mr. Gladstein: No, just an opportunity to speak and answer what you say.

The Court: Yes. Well, you're always helpful, Mr. Gladstein.

Mr. Gladstein: I try to be, your Honor.

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—Tr. Tr. 13,116—

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The Witness: Well, I wanted to explain why I had a special reason for remembering the discussion between Mr. Allen or the discussion in which Mr. Allen and Mr. Stachel were involved in these meetings of June and July 1945—

Mr. McGohey: Now, may I interrupt for just a minute, Doctor, please?

The Witness: May I proceed?

The Court: Just a moment. There is no rush

—Tr. Tr. 13,117—

about this.

The Witness: All right.

Sillen—Cross
Colloquy

The Court: You are going to get a chance to give your explanation. There is just one thing I want you to bear in mind, that when I sustain objections, as I did to that issue of the Daily Worker, I do not like to have a witness bring the matter right in again on the bias. I want you to bear that in mind.

Now, what is it you have on your mind, Mr. McGohey?

Mr. McGohey: I understood the explanation the witness desired to make was an explanation of why he remembered the names of some people and not the names of others—

Mr. Gladstein: No—

The Court: No, I don't think so. I think what he wanted to explain—he brought it up himself, it is true,—

Mr. McGohey: Yes?

The Court: —but what he wanted to explain was how he happened to remember what these two men had said. He brought it up himself, but he wants to explain it, and I am disposed to give him an opportunity to do so even though you did not ask him to explain it.

Mr. McGohey: Well, that wasn't the point of my observation to your Honor. I thought—apparently

—Tr. Tr. 13,118—

I was mistaken—that he was giving an explanation on a different point than he had asked permission to give.

The Court: I don't think so.

Mr. McGohey: I understand now he is proceeding along the lines your Honor suggested he might do.

Sillen—Cross
Colloquy

The Court: I think he is giving an explanation for the thing he brought up and said he wanted to explain, and I told him he could do it, with this exception, that the minute I find that he is bringing in something that I have sustained objection to, then I will stop him. But if it is not that, I will let him go ahead.

Now you go ahead, Dr. Sillen, and tell us what the explanation is and how you happen to remember all about these statements on the one hand by Mr. Allen and on the other hand by Mr. Stachel.

The Witness: Well, as I say, I have had a special reason for remembering this. About two years after this discussion took place there appeared a book by Mr. Budenz entitled "This Is Our Life" in the course of which Mr. Budenz refers specifically to this group of meetings; that is, the meetings of the Daily Worker staff called to discuss the draft resolution. I had charge of the book section of the paper as literary editor. I read the book and found that in his references to this meeting he quoted Mr. Allen—

—Tr. Tr. 13,119—

Mr. McGohey: If the Court please, I desire to be heard, your Honor.

Mr. Gladstein: I think the witness should be permitted to finish, your Honor.

Mr. McGohey: Well, his Honor has indicated he will give him permission, but I desire to address myself to the Court now, and I ask permission so to do.

The Court: You may do so, Mr. McGohey.

Sillen—Cross
Colloquy

Mr. McGohey: Now, if the Court please, there were various attempts on the cross-examination of the witness Budenz to introduce this very book that the witness is now talking about, and your Honor excluded it.

The Court: All right. Now you show me the page. If I find that is so he won't get a word in in addition about this explanation. That is just the kind of thing I wanted to look out for.

Mr. Gladstein: I don't understand your Honor's remarks—

The Court: You may not understand, Mr. Gladstein, but if I find that this witness is bringing in something that I have already excluded, it is going to go out. Now I have had just a little bit too much of that in this trial.

Mr. Gladstein: Well, I am not sure, your Honor, that that does happen to be the fact, that he is trying to bring in anything—

—Tr. Tr. 13,120—

The Court: Well, we will soon find out, and I do not want any more argument.

What is the name of that book, Mr. Reporter?

The Reporter: "This Is Our Life."

The Witness: I meant "This Is My Life."

The Court: Not "This Is My Story"? My notes refer to "This Is My Story." Is that the same one?

The Witness: Yes.

The Court: I have a reference here to page 87 of that book.

Mr. McGohey: Yes, I direct your Honor's attention to page 2117 of the transcript.

Sillen—Cross
Colloquy

Mr. Gladstein: Is that the only reference you have, Mr. McGohey?

Mr. McGohey: Pardon me, I will answer that in a minute. I am just going through the transcript.

Mr. Gladstein: That page does not deal with anything like what Dr. Sillen is talking about.

Mr. McGohey: Now I object to that, your Honor.

Mr. Gladstein: Well, it is just true—

Mr. McGohey: Well, it is not true. I have said, your Honor, that this book was attempted to be offered in evidence, and it was ruled out, and that is the fact.

The Court: If we are going to have any of this disorderly argument I will put an end to it right now, and that is the end of that explanation.

—Tr. Tr. 13,121—

Mr. Gladstein: The pages of the book deal with—

The Court: When you start shouting that way, Mr. Gladstein,—

Mr. Gladstein: I wasn't shouting, your Honor.

The Court: —you do not impress me favorably; and when you make statements of fact that you have no right to make you do not impress me favorably either.

I now sustain the objection and exclude the balance of the explanation.

Now go ahead.

Mr. Gladstein: I do not know why your Honor says the balance. You have not allowed the witness to give any of it.

The Court: I do not want any argument, Mr. Gladstein. That is all the disorder in this trial we are going to have.

Sillen—Cross
Colloquy

Mr. Isserman: I must object to your Honor's remark—

The Court: Oh, you are back, Mr. Isserman?

Mr. Isserman: I object to your Honor's remarks and to your Honor's rulings.

The Court: Very well. Go ahead, Mr. McGohey.

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—Tr. Tr. 13,123—

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Q. Let me ask you, without giving me the names, do you have in your mind persons, their names, who were on that committee at the time you first recall its existence?

Mr. Gladstein: I object to that as not proper cross-examination.

The Court: Overruled.

A. No, I cannot do that.

Q. You just have no recollection about these things I have asked at all? A. No, I did not work through an executive committee, particularly at that stage of my employment, where I devoted my time completely to literary pursuits and was not in regular attendance at board meetings.

The Court: Have you those names and positions in your mind?

Mr. Gladstein: I object to your Honor's question.

—Tr. Tr. 13,124—

The Court: Overruled.

Mr. Gladstein: Also to the manner in which your Honor asked the question.

The Court: There is nothing about the manner.

Mr. Gladstein: And the gesture that accompanied it.

The Court: I raised my hand and you criticized me a number of times and I see no basis for such criticism. I am going to get at this—

Mr. Gladstein: Naturally your Honor sees no basis for criticism but an attorney who represents and defends clients may have a different view.

The Court: What I object to is false statements of the things that are said to be done by me and not done by me. That is what I object to and you and your colleagues have filled this record with statements of things I am supposed to have done and I never did. Every time you staft that I am going to see the record is kept straight.

Mr. McGohey: Will your Honor hear me?

Mr. Gladstein: Give me the courtesy at least. Since the Court made that statement for the record, I am saying I do not concede I have ever falsely attributed to the Court a gesture or tone I thought was improper except as I saw it, as I observed it, as I heard it, as I heard it expressed here in this court-

—Tr. Tr. 13,125—

room and believed I saw and heard what I heard.

The Court: I should not expect you to admit that, Mr. Gladstein.

Mr. McGohey: If the Court please, will you hear me? I suggest that it is now twenty-five minutes after three. Our ordinary time for recessing is half past

three and I call your Honor's attention to the fact of the disobedience again to your rules. There has been a long objection which contained an argument made by Mr. Gladstein interrupting my cross-examination at a point I am pressing for something. That is not the first time that has happened.

Mr. Gladstein: That is absurd, and I move—

The Court: You will please stop argument.

Mr. Gladstein: I move the Court not to have the recess at all, just to show Mr. McGohey what he says is untrue.

The Court: That would scarcely prove it, Mr. Gladstein, but we will take the recess just to let everybody cool off.

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—Tr. Tr. 13,163—

New York, August 26, 1949

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Q. Now, did you give a report to that conference?

Mr. McGohey: I did not hear the question.

The Court: The reporter will read it.

(Question read.)

Mr. McGohey: Objection.

The Court: Sustained.

Q. Did you make a statement to the defendants there present concerning your work in coalition activities?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Were you engaged in coalition work?

Mr. McGohey: Objection.
The Court: Sustained.

—Tr. Tr. 13,164—

Q. Will you tell the Court and the jury what coalition work you have been engaged in as a member and officer of the Communist Party?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Now, Mr. Strong, you have been actively engaged for many years in broad mass organizational work on behalf of the Negro people, isn't that so?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you formerly work with and for an organization known as the Southern Negro Youth Conference?

Mr. McGohey: Objection.
The Court: Read me that question, Mr. Reporter.

(Question read.)

The Court: Sustained.
Mr. Gladstein: I want to amend that. I said "Conference" and I should have said "Congress."

Mr. McGohey: As amended I object to it.
The Court: Same ruling.

Q. Did you have a position with the organization that I have just named?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you yourself engage for many years in combat-
—Tr. Tr. 13,165—
ting force and violence in the southern part of our country?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Have you yourself experienced and been the victim of force and violence?

Mr. McGohey: Objection.
The Court: Sustained.

After my rulings, Mr. Gladstein, I cannot fail to observe a certain persistency here that seems to me not quite proper. You know you ask questions like that and people sometimes draw inferences from the mere asking of the question. And my rulings have been so explicit that I think you had better try to avoid that in the future.

Mr. Gladstein: I—my hesitation was due to an effort to restrain myself against making the reply which I felt your Honor's remarks warranted.

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—Tr. Tr. 13,338—

New York, August 29, 1949

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Mr. Sacher: May I be heard on that, your Honor?

The Court: No.

Mr. Sacher: In view of the fact that Mr. McGohey—

The Court: I will not hear you.

Mr. Sacher: But Mr. McGohey was permitted to make a statement concerning this.

The Court: Mr. McGohey responded to a question from me and further asked leave to address the Court which I permitted. I do not desire to hear you.

Mr. Sacher: I have asked your Honor for leave.

The Court: Please be silent, Mr. Sacher. Again you are deliberately contemptuous.

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—Tr. Tr. 13,346—

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Mr. Isserman: I am calling specific attention to the question by the Court on page 23—

The Court: The main point up there in that editorial office is that they changed these things around before they published them. Now why don't you ask him that?

Mr. Isserman: That is not the main point. That is perhaps your Honor's testimony, but it is not the testimony of this witness. It might have been Mr. Budenz's testimony.

The Court: Well, I think you had better try to control yourself a little bit, Mr. Isserman.

Mr. Isserman: I think that is not the main point at all, your Honor.

The Court: Well, put the question in your own way but don't please make statements about my testifying, which I had no intention whatever of doing.

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—Tr. Tr. 13,425—

New York, August 30, 1949

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Mr. Gladstein: Your Honor permitted the witness Nicodemus to testify on this subject, I might point out, and I am willing to show your Honor the record.

The Court: I do not need any argument. Go ahead.

Mr. Gladstein: No, it is not argument. I just thought that inasmuch as you permitted Mr. Gordon to elicit that testimony from Nicodemus, the same rule, in all fairness, should apply to our witnesses, and we should be permitted to show this jury the status that this witness has had with fellow members of the union and workmen in that plant.

The Court: Mr. Gladstein, at the earliest stages of this trial before I was convinced that it had become an endurance contest I permitted a great many things that I thought were on the fringe of relevancy, and I found that I could not do that without unduly prolonging the trial. I think the question of what other offices this witness may have held in the union

is quite remote and not really important, I am willing to state, however, that if the matter had arisen some months ago I probably would have permitted it, as I could see no particular harm. But now I rule it out.

Mr. Gladstein: All I am pointing out to your Honor

—Tr. Tr. 13,426—

is that all the time that the Government witnesses were on the stand you permitted the prosecution to elicit that kind of testimony.

The Court: I understand the view which you and your colleagues have often expressed here, which is that I am partial to the prosecution; that I have been conniving with them and doing various other things, which are not so; but all I can do is merely say that you are wrong about that. I am trying to do the best I can here to administer justice, and it has seemed to me that the time was reached some weeks ago where I was absolutely required to make this series of rulings that I made. So that you need not pursue that subject further.

Mr. Gladstein: I won't, your Honor, because you have directed me. All I wanted to say is to show that your Honor applied one rule to the prosecution and a different one to us.

The Court: I say that I did no such thing. I say what happened was that in the course of the development of the trial there had been various things happening which made it necessary for me to make the rulings that I did. I do not consider that as favoring one side as against the other at all.

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—Tr. Tr. 13,481—

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Q. Who was present? A. Well, there was Mr. Schusterman, Nicodemus, Nicodemus's girl friend—Louise Trail—

Mr. McGohey: I object to the characterization, your Honor.

The Court: I don't know what I am going to do with these people, I swear. What on earth possessed you to bring that in, will you tell me?

The Witness: The question was who was there, your Honor.

The Court: Did some one of these lawyers tell you to put that in?

The Witness: No, they did not, sir.

The Court: Well, I will strike it out. This description of that woman as Nicodemus's girl friend was absolutely a gratuitous thing brought in by the witness without any occasion at all. I won't have that sort of thing.

Mr. Gladstein: But it is no occasion for your Honor to insinuate, as your Honor did, in asking the question as to whether the witness was told to say that by a lawyer—

The Court: Well, I have had so many of these

—Tr. Tr. 13,482—

things in this trial that the idea is beginning to percolate that it happens for some reason, and I don't want it anymore. I have expressed myself on that subject again and again, and it is only a few moments ago that I sustained objections with this

last witness to questions about that woman that has just been named, and I won't have my ruling circumvented in that way. That is all there is to it.

Mr. Isserman: I did not object to the Court's question to the witness, which I thought was improper, because I wanted the Court to get the answer, but I do object to the Court's asking the question now, and the Court's comment in respect to the situation concerning which the Court has made its remarks, and I regard them as prejudicial and so charge; entirely unwarranted by anything in this record.

The Court: Very well.

Mr. McGohey: May I be heard, your Honor?

The Court: Yes, Mr. McGohey.

Mr. McGohey: I take it your Honor's observation to the witness is an instruction that such characterizations be refrained from hereafter?

The Court: It certainly is, and if he keeps doing it he may be sorry.

Mr. Isserman: I object to that remark.

—Tr. Tr. 13,483—

The Court: Very well.

Mr. Gladstein: I still don't know why everybody is so excited. What is so terrible about the expression the witness used?

The Court: I won't hear any argument from you, Mr. Gladstein, and you just try, when you desire to argue without asking my leave first. You have so persistently disregarded that direction that I cannot do otherwise than now find, as I do, that it was deliberate and contemptuous.

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—Tr. Tr. 13,484—

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Q. Were you running for office then?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Were you a candidate for president of the union at that time? A. Yes.

Mr. McGohey: Objection.
The Court: Sustained.

Q. In what month of the year 1946 were the union elections held?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was the election in February 1946 at the time of the meeting or get-together?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Were you elected president in February 1946 of the union? A. Yes.

Mr. McGohey: Objection.
The Court: Sustained. Strike out the answer.
Mr. McGohey: Will your Honor suggest to the witness to wait a second so my objection may be heard.

The Court: I do that.

The Witness: I have tried to.

The Court: I wish you would.

—Tr. Tr. 13,485—

Q. Were you subsequently in 1947 elected a second time as president of the union—of that organization? A. Yes, sir.

Mr. McGohey: Objection.

The Court: Sustained.

Mr. McGohey: I desire to address the Court. May I do so without Mr. Gladstein's interruption. I desire to ask your Honor to direct Mr. Gladstein to refrain from testifying with this type of leading question, and your Honor has repeatedly sustained the objection.

The Court: I so direct.

Mr. Gladstein: I desire—

The Court: I don't want to hear anything from you, Mr. Gladstein. I want to tell you something: you will discontinue this mode of questioning which is suggestive of facts that I am ruling out. You have persistently done it on various prior occasions when it is quite clear that I have ruled out certain lines of testimony, and you keep adding circumstantial details in additional questions in a way which cannot fail to appear to be a deliberate attempt to get into the minds of the jury those facts even though they are not answered by the witness. You will please desist from that in the future.

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—Tr. Tr. 13,508—

New York, August 31, 1949

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Q. But you say the photostat in front of you is not your membership card? A. It possibly could—

Mr. Gladstein: Is that supposed to be—

The Court: Just in time to stop him.

—Tr. Tr. 13,509—

Mr. Gladstein: Just to ask where Mr. Gordon got hold of this.

The Court: Overruled. I deny the application.

Now, Mr. Witness, continue your answer. I will have no more interruptions of the cross-examination, Mr. Gladstein. We have had too much of that in this case.

Read the part of his answer that he gave before.

(Question and answer read as follows:

"Q. But you say the photostat in front of you is not your membership card? A. It possibly could—")

The Witness: (Continuing) It possibly could be but then again it could not be because the name on this card is printed in handwriting.

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—Tr. Tr. 13, 512—

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Mr. Gladstein: I would like to renew my inquiry and ask the Court to ask Mr. Gordon to state the source from which this was obtained.

The Court: I shall give no such direction.

Mr. Gladstein: The point is—

The Court: I don't want argument on it, Mr. Gladstein.

Mr. Gladstein: There may be a question of illegal obtainment of the document and I raise that question. I should think the Court should be interested in it.

The Court: You know how to raise it.

Mr. Gladstein: The way to do it is to object and I do, and ask your Honor not to permit further inquiry until the prosecution has established how and where and from whom it came by this exhibit that is being shown the witness.

The Court: I deny your application.

Mr. McGohey: Will your Honor please admonish Mr. Gladstein again not to be interrupting the examination like this, which he knows is not proper.

The Court: Well, I hesitate to give those instructions. I have given them so often here.

—Tr. Tr. 13,512a—

Mr. Gladstein: Again I renew—

The Court: I am not going to give such a direction now, Mr. Gladstein, except to say I don't want to hear any argument.

Mr. Gladstein: May I reply to Mr. McGohey's remark?

The Court: No, you may not.

—Tr. Tr. 13,513—

By Mr. Gordon:

Q. Now, Mr. Coleman, I show you Exhibit 206-A for identification. Will you look at that and look at the num-

ber up in the righthand corner and compare that with the number on 206 for identification; and tell me whether that refreshes your recollection as to whether or not you or someone for you filled out a registration when you got your 1947 membership card which you possibly got.

Mr. Crockett: If the Court please, I object to the question and request that the Government be compelled to show what has happened to the original before any use is made of the photostat.

The Court: The objection is overruled. The motion is denied.

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—Tr. Tr. 13,518—

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Q. Now there is a signature on the card? A. That is true, there is.

Q. Now does it look like the signature of anybody that you know?

Mr. Gladstein: I object to that—

The Court: Overruled.

Mr. Gladstein: —because it is a photostat.

The Court: Overruled.

Q. Well, now, I suppose— A. That question has been answered before. There is a signature on the card.

Q. Mr. Coleman, the question is, does it look like the signature of anybody that you know.

—Tr. Tr. 13,519—

Mr. Gladstein: I object to that.

The Court: Overruled.

A. I think I have answered that question before also, that—

The Court: You will answer it again. Now what is the answer?

The Witness: Yes, I know him.

The Court: It does look like the signature of somebody you know?

Mr. Gladstein: Just a moment. I object to your Honor's tone and manner and the questions, and particularly since we have had the experience in this case of mimeographs used—I mean stencils, stamps, used for signatures when there wasn't really the signature. Your Honor can remember—

The Court: You are deliberately contemptuous again, Mr. Gladstein.

Mr. Gladstein: Well, I assign your Honor's questions and the manner in which they were directed and the fact of the questions as misconduct.

The Court: Go ahead, Mr. Gordon. There is nothing about my tone or my manner that justifies any such characterization.

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—Tr. Tr. 13,527—

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Recross Examination by Mr. Gordon:

Q. The claim of the nervous disorder was one you made when you went to the port of embarkation to go overseas? A. I don't recall.

Q. Do you remember being examined at the time you were about to go overseas? A. I think there was complaints of nervousness before that.

Winter—Direct
Colloquy

Q. You did not mention it at the time you were examined for induction? A. No, I don't think I did.

Mr. Gordon: Thank you.

Mr. Gladstein: No questions about Mr. Nicodemus?

The Court: Now, Mr. Gladstein, you simply must not do that.

Mr. Gladstein: That is all.

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—Tr. Tr. 13,529—

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Q. Now will you tell us why you took the name Carl Winter?

Mr. McGohey: Objection.

The Court: What was the date after which you used the name Carl Winter for all purposes, Mr. Winter?

The Witness: I am just trying to get the exact date—the end of 1931. I might say there was one exception to that and that was when my birth certificate was required.

Q. Now I think I had asked the question why did you adopt the name Carl Winter.

Mr. McGohey: That was objected to—that question.

The Court: Sustained.

Mr. Crockett: May I be heard on that, if the Court please?

The Court: No.

Q. Mr. Winter, were either of your parents in the Com-
—Tr. Tr. 13,530—
munist or Socialist movement in this country?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Were either of your parents a member of the Communist Party?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was your mother a member of the Communist Party?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was your mother one of the charter members of the Communist Party in 1919?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Was your father a member of the Socialist Party of the United States?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. McGohey: Your Honor, may I address the Court?

The Court: Yes, Mr. McGohey.

Mr. McGohey: I ask your Honor to suggest to Mr. Crockett where this line of questioning has been repeatedly excluded that he ought not by a series of questions leading in nature get before the jury the evidence which the Court has excluded and indicated ought not to be presented to the jury.

—Tr. Tr. 13,531—

Mr. Crockett: May I be heard, since Mr. McGohey is imputing improper motives to me?

The Court: Mr. Crockett, you have doubtless heard me on various occasions here advise counsel not to continue a series of more and more circumstantial questions when I have excluded a certain subject, as the inevitable consequence of such procedure is to suggest to the jury the truth of the facts stated in the questions, and I direct you not to do that again.

Mr. Crockett: I had assumed, if the Court please, that the objection was one of form.

The Court: I don't want any argument.

Mr. Crockett: I am not arguing. I am trying to explain.

The Court: That sounds like argument, and I do not desire it.

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—Tr. Tr. 13,577—

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Q. "4. State organizations may publish special discussion bulletins if they so desire."

Winter—Direct
Colloquy

Was there a special discussion bulletin published by the state organization in Michigan? A. No, there was not.

Q. Was there any reason why there was not?

Mr. McGohey: Objection.

The Court: Sustained.

Q. Were you financially able to put out a statement?

Mr. McGohey: Objection.

The Court: Now, Mr. Crockett, you know to ask that kind of series of questions is like telling the jury what the answer is when I am ruling it out. This time it does not make any particular difference but please don't do that any more.

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—Tr. Tr. 13,700—

New York, September 8, 1949

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The Court: Very well, Mr. Sacher, I understand you have an application.

Mr. Sacher: I have, your Honor. This is an application for several types of relief. It is an application in the first place for the declaration of a mistrial on the ground that the violence and force manifested at Peekskill, New York, on Sunday of this week against hundreds upon hundreds of people who had peaceably assembled to attend a concert was a manifestation of the bias and prejudice engendered by the Government agencies, both Federal, State and

local, against the Communist Party and its members and against these defendants in particular.

It is a motion further for the Court to direct the United States Attorney to proceed forthwith to an investigation and prosecution, if such investigation

—Tr. Tr. 13,701—

should reveal what we contend it would reveal, namely, the gross violation of rights federally protected for citizens of the United States under the provisions of Section 241 of the Federal Judicial Code.

It is also an application for your Honor to inquire into all of the surrounding circumstances in connection with the occurrence of those events inasmuch as they constitute a manifestation of the most lawless conspiracy on the part of the government agents and agencies, in the violation of the constitutional rights of the persons assembled at Peekskill and therefore come within the Federal jurisdiction.

In this connection the application is predicated upon the fact that this was an organization of force and violence by agencies of government in subversion of the constitutional guarantees which are extended to all persons within our country and within the Southern District of New York where these acts were perpetrated.

In support of this application I have here the affidavits of a number of people, among them an affidavit by the defendant, Benjamin J. Davis.

The Court: You need not describe the affidavits. I will look at them when you hand them up.

Colloquy

Mr. Sacher: Does your Honor permit me to argue the contents of the affidavits?

—Tr. Tr. 13,702—

The Court: Let me look at the affidavits first.

(Papers handed to the Court.)

The Court: I think I will take a recess for a few moments until I can consider these affidavits. Are there other affidavits or are these all counsel has to submit?

Mr. Sacher: Except we offer in the affidavits to produce witnesses who will give oral testimony. These are all we have been able to get in the short period but there are available many persons who were assaulted and attacked.

The Court: I am concerned with what is submitted but I understand these papers I have are all the written proofs submitted?

Mr. Sacher: That is correct.

The Court: I will take a recess for a few minutes until I can read these over.

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—Tr. Tr. 13,711—

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The Court: I must say I am a little bit inclined to think that as a mere matter of jurisdiction in the fundamental sense, not jurisdiction in the sense that is so commonly used improperly, but in the fundamental sense it may well be that I, as the Judge of this court, have the power, but it is very clear to me that that should be exercised, if it is exercised at all, by some Judge holding the regular term of

court at which such motions should be made returnable, and I do not want to take the position that I have no jurisdiction in this fundamental sense because it may be that I have, but I am quite clear that even if I had it that it would not be proper for me to exercise it here. What I shall do is to deny the first part of the application on the merits.

The second part of the application I deny without prejudice to its renewal at a motion term of the court.

Defendant Dennis: May I be heard on this?

—Tr. Tr. 13,712—

The Court: Yes; I will hear you, Mr. Dennis.

Defendant Dennis: I would first like to address myself to the merits.

The Court: I don't want to hear any argument on the merits, Mr. Dennis. I have studied these papers carefully and I do not want to hear any argument on that.

Defendant Dennis: But it seems to me, your Honor, that the fascist force and violence that took place and was instigated—.

The Court: Now you know, Mr. Dennis, some time ago in this trial you and I have had quite a number of little passages. At one time I had to leave the bench because you were so disobedient of my directions, and then there was that time when I was compelled to sentence some of the defendants here for contempt, and I told you then I would treat you as one of the lawyers, and I have.

Now I direct you not to argue on the merits of this case. If you choose to disobey me I am going to

do just what I have done all through this trial. I am not going to shout or bang any gavel or use any other means. If you persist I may merely have to leave the bench, but I hope you will obey on this occasion.

Defendant Dennis: Well, in view of that, and in

—Tr. Tr. 13,712-A—

view of the remarks of your Honor which are highly prejudicial to all of the clients and all of the defendants and to myself in this statement, that if I speak on this highly important thing your Honor would leave the bench, then may I be heard on the second motion?

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—Tr. Tr. 13,717—

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Mr. Crockett: * * *

Now this morning we have filed a formal motion supported by affidavits, sworn affidavits, calling to the attention of this Court the violation of a Federal statute here within the jurisdiction of this Court. I submit, therefore, that what is taking place is a desire to put the formal requirements ahead of the more fundamental requirements; and as a member of a minority group I have actually seen lynchings take place and I know that all too frequently we take these formal subjects and—

The Court: That is enough, Mr. Crockett. No more argument, if you please.

Mr. Crockett: May I complete my argument?

The Court: No, I do not want to hear any more

argument. The minute I hear you go off on that favorite subject, I decided no more argument.

Mr. Crockett: I see a direct relation, your Honor—

The Court: No, there is no relation whatsoever.

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—Tr. Tr. 13,893—

New York, September 9, 1949

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Mr. McGohey: Objection.

The Court: What is that?

Mr. Crockett: I wanted to know what is the Black Legion.

The Court: I guess Mr. McGohey was right in his objection. I will sustain the objection now and direct no further answer be made. I am not going to have this continual wandering off into these other fields because if a question is asked the witness may go off into any sort of explanation. I don't consider this apposite to what is called for and I don't want any further argument.

Mr. Crockett: May I point out—

The Court: I don't want further argument.

Mr. Crockett: I wanted to say—

The Court: I think you are in contempt now. Don't do it. I will not have any more. The time for that is over.

—Tr. Tr. 13,894—

Mr. Sacher: I wish to object to your Honor's characterization of Mr. Crockett's conduct as contempt.

The Court: You may object. You have done enough of it yourself.

Mr. Sacher: I wish to object to that characterization. I think the record will prove, I think, your Honor has sought to prejudice this jury sufficiently against counsel.

The Court: You are deliberately contemptuous again.

Mr. Sacher: I am not. I wish to defend the rights of my clients and the right to advocate their cause and I resent the constant obstruction of that effort on the part of the Court.

The Court: There has been no obstruction of effort, but I will have order by the attorneys here, and I will enforce it with every power at my disposal.

Mr. Crockett: May I ask if the Court is suggesting there has been any disorder by the attorneys?

The Court: You insisted upon continuing arguing only a moment ago and I told you to stop.

Mr. Crockett: I was not arguing.

The Court: That is what you now say but every time you said it you kept it up. Let us stop now and go on with the questions.

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—Tr. Tr. 13,956—

New York, September 12, 1949

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Q. Did you in any radio broadcast in Detroit, Michigan, state your views as to how the ultimate objective of Socialism was to be achieved by the Communist Party of the U. S.?

Winter—Direct
Colloquy

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you in a radio broadcast in Detroit in September of 1946 state that Socialism is not the result of a minority seizure of power?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. McGohey: Now, if the Court please, I should like to be heard.
The Court: I will hear you, Mr. McGohey.
Mr. McGohey: It was sought by the witness Berry to introduce this speech. The Court sustained all the objections to it. The speech was excluded. Now Mr. Crockett says he desires to lay a foundation for the introduction of the speech now, and he asked a

—Tr. Tr. 13,957—

series of questions to which objection was sustained.
Now it is apparent that we are getting into a line of questions, containing in the questions themselves the text of the speech or various parts of the speech. Now, that is a practice which the Court has frowned upon heretofore and I suggest that it ought not to be indulged in now. Either the speech is admissible or it isn't. If it isn't admissible, it is certainly not admissible piecemeal by asking a series of leading questions.
The Court: That is right, and I have had occasion to tell counsel not to do that.
Mr. Crockett: May I be heard?
The Court: But I have complete confidence that

when I instruct this jury that matters excluded are to be given absolutely no consideration whatever and that they are only to follow the proof as given, I am confident that they will follow my instructions to the letter, and I have tried to avoid giving admonitions any more than strictly necessary, and I do think, Mr. Crockett, that perhaps you do not need to go over so many of these details; I think it is better not to. I will not give you a direct admonition here with reference to it. You may follow your own wishes.

Mr. Crockett: I wonder if I may be heard with

—Tr. Tr. 13,958—

reference to Mr. McGohey's objection.

The Court: Well, Mr. Crockett, I think it is far better if you let the matter rest. We have had so many instances where it has seemed to me that when something was excluded there was a series of questions that obviously were taken right from the paper, and the purpose of it seemed very plain to me, and I had occasion to tell some of the lawyers for the defense not to do it. Now, instead of taking a hint now, which I tried in all delicacy to give you, without doing more than that, you want to argue about it. Now, don't you really think it is wiser if you drop that radio speech, and perhaps offer it again? If you do, I am going to exclude it and then pass on to something else. It is the wiser course to pursue, but if you desire to argue the matter I will let you do it.

Mr. Crockett: I shall follow the Court's sugges-

tion and drop any further questions concerning the radio speech, but I should like to note on the record my objection to the frequency with which Mr. McGohey is permitted not only to interrupt my examination, but is permitted by the Court to make statements derogatory of my conduct as an attorney, and I upon requesting an opportunity to be heard am denied that right.

The Court: I didn't deny it; I did just the opposite, Mr. Crockett. I said I would hear you. I think

—Tr. Tr. 13,958-A—

that is a very curious way to express yourself after I have just told you I would hear you, but go ahead.

Mr. Crockett: Your Honor, there have been frequent instances.

The Court: I am not going to get all excited about this. It is a very trivial phase of the case, and I think now, as it is exactly half past eleven, we will take our usual ten-minute recess.

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—Tr. Tr. 13,981—

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Q. Do you recall the name of the arresting officer?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Were you shown a warrant for your arrest?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did you inquire of the officer if he had a warrant for your arrest?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did the officer tell you he had no warrant?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Where were you taken after you were arrested?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Did the officers make any search of your automobile, Mr. Winter?

Mr. McGohey: Objection.
The Court: Isn't this the matter we had up before, Mr. Crockett?
Mr. Crockett: This is precisely what I am leading up to.

—Tr. Tr. 13,982—

The Court: Well, it seems to me that there is nothing in the case to warrant pursuing the subject.
Mr. Crockett: Well, then, if the Court please, I think the record in this case indicates that certain documents were taken from Mr. Winter's possession at the time of his arrest and that they are now in the possession of the United States Attorney.

The Court: Don't you know you made a motion and I denied the motion? Nothing has come up in this case, nothing has been offered that has any bearing on this, so far as I am aware, and I would suppose that if you desire to pursue the subject I shall dismiss the jury for the moment, but I am quite clear in my own mind that there is no basis for pursuing the inquiry.

Mr. Crockett: Well, I request, or rather, I move the Court to direct the United States Attorney to produce forthwith the documents taken from the possession of my client since I propose to use them in connection with further examination of my client.

The Court: What do you say, Mr. McGohey?

Mr. McGohey: If the Court please, that motion was made, briefed and decided by the Court and denied.

The Court: Do you oppose it now?

Mr. McGohey: I oppose it now.

The Court: The motion is denied. We have been

—Tr. Tr. 13,983—

all over that, Mr. Crockett.

Q. Mr. Winter, do you recall approximately how many documents were taken from your car at the time of your arrest?

Mr. McGohey: Objection.

The Court: Sustained.

The Witness: May I correct a statement of fact on the question, your Honor?

Mr. McGohey: Objection.

The Court: No, no. I sustained the objection, Mr. Winter.

Mr. Crockett: May I ask for a brief adjournment while I can examine those documents again, your Honor, to select those portions I would like to question my witness about?

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained. I shall not permit it.

Q. Mr. Winter, can you tell us the names of any of the documents that were taken from you, or taken from your automobile, at the time of your arrest?

Mr. McGohey: Objection.

The Court: Sustained.

—Tr. Tr. 13,984—

Q. Now I think you testified that subsequent to the 1945 Convention you returned to Michigan and you continued a member of the Communist Party. Will you tell us what your intention was in remaining a member of the Communist Party during the period of April 1945 to July 20, 1948?

Mr. McGohey: Objection.

The Court: Sustained.

Q. What was your purpose, Mr. Winter, in remaining a member of the Communist Party during the period covered by the indictment?

Mr. McGohey: Objection.

The Court: Sustained.

Winter—Cross
Colloquy

Q. I call your attention to the early part of 1948, Mr. Winter? Did you attend any meetings of the National Committee of the Communist Party during that period? A. I did.

Q. Did any of those meetings deal with the question of the objective of the Communist Party of the United States?

Mr. McGohey: Objection.
The Court: Sustained.

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—Tr. Tr. 14,124—

New York, September 13, 1949

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Q. Did you vote from Bronx Park East in 1927? A. I don't remember.

The Court: I thought you just said that you lived there after February 1, 1928.

The Witness: I first said I did not remember when I lived there but I do remember that in 1928 I lived there. I don't remember whether it was after that or before that, but I remember it in connection with traveling to work.

Q. Didn't you tell us a minute ago that you lived in Bronx Park East some time after you got this job in the Board of Transportation for which you filed this applica-

—Tr. Tr. 14,125—

tion which is Government's Exhibit 213? A. That is a

fact. I may also have lived there before then, but I don't remember.

Q. Do you want to change your testimony now? You might have lived there?

Mr. Crockett: Objection.

The Court: Overruled.

A. I said I don't remember when I lived there.

The Court: There is nothing to laugh about, Mr. Crockett.

Mr. Crockett: It is amusing considering the date of the exhibit.

The Court: It may be to you but it is not to me.

Mr. Crockett: May I call your attention to the date of the exhibit, February 1928.

The Court: You may not make suggestions during the cross-examination as you have done so frequently before.

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—Tr. Tr. 14,221—

New York, September 14, 1949

The Court: It seems to me, Mr. McGohey, that the only portion of this certificate that has relevancy in here is the address, and I notice some things on here that I would not consider have any bearing on the case at all.

Do you desire to examine the certificate to see if you may limit your offer somewhat?

Mr. McGohey: Without looking at it, your Honor, I am very glad to limit it to the name, the date and address.

The Court: As so limited, I shall overrule the objection and receive it.

The Witness: May I consult counsel, your Honor?

The Court: Yes. Mr. Crockett, your client desires to confer with you for a moment off the record and I shall permit it.

(Mr. Crockett conferred with the witness at the witness stand, off the record, and out of the hearing of the jury.)

(Mr. Crockett returned to the counsel table.)

Mr. McGohey: If the Court please, I don't know whether I made it clear that the name that I was referring to is the defendant's name.

The Court: Yes.

—Tr. Tr. 14,222—

The Witness: I am not sure, your Honor, whether Mr. Crockett and I understood each other.

The Court: Well, you may come back, Mr. Crockett.

(Mr. Crockett conferred with the witness at the witness off the record and out of the hearing of the jury.)

The Court: Maybe you wanted him to state some further objection and he will do it if you tell him.

(Mr. Crockett returned to the counsel table.)

Winter—Cross
Colloquy

The Court: Do you desire to add to your objections, Mr. Crockett?

Mr. Crockett: No, I do not.

The Court: Very well.

I shall receive the name and the address, and so that there may be no misunderstanding about them I shall read into the record, rather than permitting the exhibit to be handed around to the jury, the following:

"Father of the child, full name, Carl Winter. Color or race, Caucasian. Age at time of this birth, 35. Length of residence in California, zero years, three months, zero days. Birth place, Pennsylvania. Usual occupation, lecturer. Industry or business: self."

Mr. Sacher: May I call your Honor's attention

—Tr. Tr. 14,222-A—

to the fact that you indicated there were just three items, and that Mr. McGohey limited it to three items? You have read about six now.

The Witness: May I say, your Honor—

Mr. Sacher: Just the name and address, as I recall it.

The Witness: May I address the Court?

Mr. Sacher: Name, address, and date.

—Tr. Tr. 14,223—

Mr. Crockett: If the Court please—

The Court: Is this additional part that I read very objectionable to you?

Mr. Crockett: If the Court please, in view of your Honor's seemingly unintentional reading more than—

Winter—Cross
Colloquy

The Court: Mr. Crockett, that is one of the most contemptuous things that has occurred at this trial.

Mr. Crockett: I am trying—

The Court: And for that you will be brought to justice.

Mr. Crockett: I am trying to say, with the Court's permission—

The Court: You just bear that in mind, Mr. Crockett.

Mr. Crockett: Your Honor, may I—

The Court: You say I seemingly do something and accuse me of deliberately evil motives here. That is something that I cannot pass over and I shall not. I now adjudge you in contempt for that.

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—Tr. Tr. 14,240—

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Q. Now I show you what purports to be the Los Angeles Extended Area Telephone Directory of March 1943, issued by the Southern California Telephone Company and I direct your attention to page 202—

Mr. Sacher: Just a moment. I object to that question.

—Tr. Tr. 14,241—

The Court: Overruled.

Mr. Sacher: I would like to be heard if I may.

The Court: I don't desire to hear you, Mr. Sacher.

Mr. Sacher: Will there come a day, your Honor, when you will hear us?

The Court: Mr. Sacher, I consider that imper-

tinent, but you have been so persistently contemptuous throughout this trial that I suppose nothing I could say could make you desist.

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—Tr. Tr. 14,326—

New York, September 15, 1949

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Q. Do you or don't you agree with Mr. Gates' testimony that from January 1946 to July 1948 Political Affairs was the theoretical organ of the Communist Party?

Mr. Crockett: Again I wish to object to shouting by the United States Attorney.

The Court: There has been no shouting. It is perfectly absurd.

Mr. McGohey: I deny that there was shouting.

The Court: You and your colleagues have sought at every junction to misinterpret and to put false statements on the record about what I have done and Mr. McGohey has done and you must stop it. There has been no shouting by Mr. McGohey whatsoever. Please stop this sort of thing and let us go on with the trial.

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—Tr. Tr. 14,653—

New York, September 20, 1949

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Mr. Crockett: May it please the Court, I call Mr. Paul Robeson to the stand.

PAUL ROBESON, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

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—Tr. Tr. 14,656—

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Mr. McGohey: Objection.

The Court: Sustained.

Is Mr. Robeson called as a character witness, Mr. Crockett?

Mr. Crockett: He is not called as a character witness as I understand the term "character witness."

The Court: Then I will sustain the objection.

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—Tr. Tr. 14,661—

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Q. Have you ever heard Mr. Williamson speak as a representative of the Communist Party of the United States?

Mr. McGohey: Objection.

The Court: Sustained.

Q. How long have you known Mr. Dennis? A. I have known Mr. Dennis for some years.

Q. Have you ever visited with Mr. Dennis? A. Yes—

Mr. McGohey: Objection.
The Court: Sustained. Strike out the answer.

Q. Have you ever shared the platform with Mr. Dennis at any public gathering?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Have you ever shared the platform with any of the other defendants at any public gathering?

Mr. McGohey: Objection.
The Court: Sustained.

Q. I think you shared the platform with Mrs. Roosevelt, have you not?

Mr. McGohey: Objection.
The Court: Sustained.

Mr. Crockett, I am beginning to get the impression that these questions, which you must know come within my ruling of exclusion, are being asked for the purpose of getting a claim as to the facts before

—Tr. Tr. 14,662—

the jury in a way that I have noticed was done by other lawyers here in this case, and I have indicated my displeasure at such things and I hope you will try to bear that in mind.

Mr. Crockett: My understanding—

The Court: A series of questions such as you have been asking are bound to convey the impression that the facts stated in the questions are true, despite the fact that I ruled them out and despite the fact that it is obvious from my rulings that if asked and objected to I would sustain the objections and rule them out. I don't think that is what a lawyer should do.

Mr. Crockett: My understanding of your Honor's ruling is that I must fix the time, the place and the circumstances so that I can go into what was discussed.

The Court: No. I think you must know perfectly well that a question as to whether this witness was on the platform with the wife of former President Roosevelt has absolutely nothing to do with this case, and I don't think it is proper for you to continue a series of questions like that.

Mr. Crockett: I submit that it may have something to do with—

The Court: I am not going to try to do anything more to stop you from continuing that if you insist upon doing it, but I hope you will feel after what I have said that it is better for you not to continue that type of question.

—Tr. Tr. 14,663—

Q. Mr. Robeson, during the time that you have known Mr. Dennis have you ever heard Mr. Dennis teach or advocate the overthrow of the Government of the United States by force and violence?

Mr. McGohey: Objection.
The Court: Sustained.

Q. Mr. Robeson, have you at any time heard any of the defendants teach and advocate the duty or the necessity of overthrowing the Government of the United States by force and violence?

Mr. McGohey: Objection.
The Court: Sustained.
Mr. Crockett: In view of the Court's ruling I am convinced that it will be impossible to bring before the Court the testimony that I had hoped to bring before the Court through this witness.
The Court: I don't think you should have called him.

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—Tr. Tr. 14,756—

New York, September 21, 1949

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Q. Did you make a speech on the subject "Is violence the answer to the violence of the lynchers"?

—Tr. Tr. 14,757—

Mr. McGohey: Objection.
The Court: Sustained.
Mr. Sacher: Well, I would like to be heard on that, your Honor, if I may.
The Court: Mr. Sacher, I have heard you on that so often on this trial that I think it is quite unnecessary to hear any further argument on it. The greater

part of the first few months of the trial were spent in receiving proof about Jim Crow, lynching, Spain, China—various other peripheral issues—

Mr. Sacher: I am talking about violence now.

The Court: —but I finally had received so much evidence on that I was required to make the series of rulings that I made a couple of months ago. Now I should think that you could accommodate yourself to those rulings without insisting on keeping at it, but if you desire to, you may. That is your privilege as counsel, but I am merely saying now what I ruled before. It is not that I held those things were not relevant, but so many hundreds, if not thousands of pages of this record have been taken up on those peripheral issues. The question is not here whether it is right to lynch Negroes or anyone else, or whether the Jim Crow system is right or wrong. The question here is whether these defendants are individually guilty of the charge, and so,

—Tr. Tr. 14,758—

having received such a tremendous lot of evidence on that thing, intending, and indeed ruling with the utmost liberality, I have got now to stick to what I said a month or so ago, that I will receive no more.

Mr. Sacher: But, your Honor, this is a question—

The Court: I do not want any argument.

Mr. Sacher: It is not a question of argument: I think your Honor ought to know what we want to prove.

The Court: Please desist. I think I do know what you desire to prove. I have looked over these pamphlets here and I desire no argument about them.

Winston—Cross
Colloquy

Mr. Sacher: But these pamphlets have no relation to what I am asking him about. This is an altogether different, unrelated subject to these pamphlets, and I say to your Honor, Mr. Winston will prove—

The Court: Is there no way of forcing you to stop?

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—Tr. Tr. 14,913—

New York, September 22, 1949

Q. Did you talk to any of your co-defendants? A. Co-defendants?

Q. Any of the other ten defendants on trial.

Mr. Sacher: I object to that. Mr. Winston knows what co-defendants means. I object to the question.

The Court: Mr. Sacher, you are assuming your old offensive role and I wish you would drop that manner. It is not helpful here.

Mr. Sacher: Well, I object to his manner toward Mr. Winston.

The Court: You have left the distinct impression only a few moments ago both with me and doubtless with the jury that Mr. Winston was not even in the United States when that convention was had, and hence couldn't have voted for it.

Mr. Sacher: I object to your Honor's statement. I asked Mr. Winston a question.

The Court: Please don't start shouting again.

Mr. Sacher: I am not shouting, your Honor. I am replying that when I asked a question I didn't

intend to create any impression. I inquired of Mr. Winston concerning facts, and my objection is as to Mr. Gordon's manner toward Mr. Winston, and I object to it.

The Court: I find nothing in Mr. Gordon's manner to justify any comment by you. Your objection —Tr. Tr. 14,914— is overruled.

A. I am quite sure I did. I am trying to recall now whether —I am quite certain. I can't remember who.

By the Court:

Q. You were not only in the country here but you were talking to some of these co-defendants here during that period of the furlough? A. My friends.

The Court: Well, that is all right.

By Mr. Gordon:

Q. But you can't remember who? A. No, I don't. If you give me a second I probably will.

Q. Well, they are right there. See if any of them look familiar.

Mr. Sacher: I object to this remark of Mr. Gordon. The witness requested an opportunity to think.

The Court: Well, Mr. Sacher, are you just trying to create a rumpus again?

Mr. Sacher: I suggest, your Honor, that the rum-

pus is being conducted or carried on by Mr. Gordon. I am not creating a rumpus.

The Court: I find nothing to justify any of these statements here. Now I think you had better subside. Now what is the question?

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—Tr. Tr. 14,927—

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Q. Well, was your permanent residence in New York at 118 West 112th Street? A. Well, during those days I moved so many places. At that time, it was.

Q. At what time was it? A. At the time that I signed this registration blank.

Q. Yes. And during the four years it wasn't? A. What is that?

Q. During the four years it wasn't, of course? A. No.

Q. Mail addressed to you at that address would have been lost?

Mr. Sacher: I object to this question on the ground—

The Court: Overruled.

Mr. Sacher: (Continuing) On the ground that the registration says two months—

The Court: I don't want any argument about it, Mr. Sacher.

Mr. Gladstein: If your Honor please, are you going to permit the prosecution to misstate the contents of the exhibit in the course of framing these questions?

Winston—Cross
Colloquy

—Tr. Tr. 14,928—

The Court: Mr. Gladstein, I think there is no call for making any such remark as that—

Mr. Gladstein: I think the record will substantiate it.

The Court: —and I have found in this trial that as soon as the cross-examination starts, the disrupting tactics of counsel begin, and I think you had better let the cross-examination proceed without undue interruption.

Mr. Gladstein: Your Honor, may I ask if you will instruct the jury that this line of inquiry should be considered by them in the light of the fact that people do go from their permanent residence to other places without losing their residence. I have been in New York for nearly a year on this case but I don't regard myself as having—

The Court: Mr. Gladstein—

Mr. Gladstein: —as having left—

The Court: Mr. Gladstein, you have no right to make such comments. If proper at all, they come in the summation, and I have had so much of that here that I have had to admonish counsel repeatedly. Now please do not interfere any more with the cross-examination.

Winston—Cross
Colloquy

—Tr. Tr. 14,980—

New York, September 23, 1949

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Q. (Continuing) Now he said that you taught at that school, and you told us yesterday afternoon that your recollection was that you taught at only one Young Communist League School at Camp Beacon in the fall of 1938; is that right? A. That is correct.

Q. Now Mr. Manewitz was asked—

Mr. Sacher: What page is that, Mr. Gordon?

Mr. Gordon: Well—

Mr. Sacher: You are looking at a page; may I not have it?

—Tr. Tr. 14,981—

Mr. Gordon: Your Honor, Mr. Sacher asked a question, and before I could even answer it he interrupts. If he wants to know the page, I am about to tell him, and if he will listen I will tell him.

The Court: You may do so.

Mr. Gordon: It is page 11,583.

Q. Mr. Manewitz was asked, "Who was the director of the school?", and he said, "I would prefer not to mention." He was asked: "Do you know?", and he said, "Yes, sir, I do."

"Q. You do know who it was? A. Yes, sir I do know."

know."

Mr. Sacher: Just a moment. I am obliged to interrupt, your Honor. If I may, I should like an opportunity to state the ground.

The Court: I will hear you.

Mr. Sacher: The ground on which I object is that the matter which Mr. Gordon is referring to was brought out on cross, on a collateral matter. I respectfully submit that whatever is found there he is bound by and may not now use to cross-examine the witness, particularly—

The Court: Let me see if I understand. You say if on cross-examination Government counsel asks one of your witnesses a question and the witness declines to answer, that then the Government counsel may not inquire of anyone on that subject?

—Tr. Tr. 14,982—

Mr. Sacher: That is not the point.

The Court: If that is so, that is a curious way of obstructing justice.

Mr. Sacher: I haven't said that, so there is no use pulling in obstruction of justice.

The Court: Well, what do you say?

Mr. Sacher: What I do say is that the record shows that Mr. Manewitz stated that he knew who the director was but that he preferred not to state who it was. He was asked—and therefore there is nothing here to be elicited which can contradict or bear upon any of the testimony by Mr. Manewitz. There is nothing that will be elicited from this witness that can contradict that testimony.

Mr. Gordon: Your Honor, may I be heard?

The Court: I don't think I need to hear you, Mr.

Gordon. The objection was made as you were reading, and it seemed very properly from Mr. Manewitz's testimony in the transcript, as I recall—you have not yet asked your question.

Mr. Gordon: That is correct.

The Court: So that if you desire you may read that part again and put your question, and then if the question is objected to I shall rule.

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—Tr. Tr. 15,039—

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Mr. Sacher: I have just one other application to make now, your Honor, and that is this: That in view of the fact that we are about to rest our case I should like to apply now for the release and the discharge of the four men who are now confined. I think—

The Court: I don't think that is an appropriate subject to be discussed in the presence of the jury.

Mr. Sacher: Will your Honor entertain an application then, after the jury is—

The Court: I have ruled already and I still rule that those who have committed offenses against the United States and have been sentenced therefor must serve those sentences, and I shall not make any changes as to that.

Mr. Sacher: May we have permission to make an application to your Honor after the jury is dismissed?

The Court: You have made the application and I have just denied it.

Mr. Sacher: The defense now—

Colloquy

The Court: As I say, I don't think that that was an appropriate subject to bring up in the presence of the jury, but you have done it and so the matter will have to rest there.

* * * * *

—Tr. Tr. 15,168—

New York, September 28, 1949

The Court: Three fundamental conditions before socialism can come in?

Mr. Gladstein: Yes. One of them your Honor will recall is that there must exist within the country an internal situation, an economic situation of such a character that the people, the majority of the people will not, because they cannot, continue under those circumstances without seeking some peaceful and lawful change.

The Court: I wish you would explain that a little bit, internal situation of an economic character such that the majority of the people cannot continue without some peaceful and lawful change.

Mr. Gladstein: Your Honor will find in the documents the expressions of these men that socialism in this country can and only will come when, as and if the majority of the people decide that is what they want, they will so decide only if, as and when the conditions are such, that that is the choice which they seek to make, and the purpose of the Communist Party is simply to spread and communicate its views through these documents.

The Court: Well, let us get the other two.

Mr. Gladstein: Well, I have expressed the other

two in what I have said, your Honor. I do not want to spend too much on this portion because I want

—Tr. Tr. 15,169—

to go off on another portion of the evidence.

The Court: You would like me to understand it.

Mr. Gladstein: I do.

The Court: Well, I don't.

Mr. Gladstein: Your Honor, I commend then the Theory and Practice of the Communist Party; I also commend to your Honor that portion of the literature that has been offered by the defense here—.

The Court: You know, you are in effect telling me, "Judge, I could tell you in a word or two but I won't do that. You read these long papers and you will find out what I am trying to tell you.

You really ought not to do it, but go ahead.

* * * * *

—Tr. Tr. 15,208—

New York, September 29, 1949

* * * * *

Mr. Sacher: * * *

That was true of Christianity; it was true of the Renaissance; it was true of the Reformation; it was true of every social and political movement which sought to advance human thought and welfare; and in each of these societies your Honor will find, and I think it is justifiable on these motions to refer to these matters, that they are matters that to any informed person are matters of historical fact and as such we may ask your Honor to properly and logically take account of. The early Christians used

false names. They met in secret. They taught in secret. They did so many things, more than this evidence disclosed, that if Mr. McGohey were a contemporary of Jesus he would have had Jesus in the dock.

Mr. McGohey: Your Honor, I resent that.

The Court: I don't blame you.

Mr. McGohey: That is the most unconscionable thing I have ever heard, your Honor. I have been born and raised in this city. It is well known that

—Tr. Tr. 15,209—

I am a member of the Catholic Church. I firmly, with all my heart, believe that Jesus Christ is Divine, that he is the Son of God, and to have it said in this courtroom, where I am a member of the bar, that I would have persecuted my God is an insult that I can't resist interrupting for.

The Court: Please refrain from any such reference again, Mr. Sacher. That was quite improper, and I don't blame Mr. McGohey at all for resenting it; anyone would.

Mr. Sacher: I say to your Honor—

The Court: It is a terrible thing to say.

Mr. Sacher: I say to your Honor that the resort to so-called secrecy—

The Court: You don't even apologize for it.

Mr. Sacher: I am proceeding with my argument, your Honor. I have no apologies to make.

The Court: The depths to which you can sink to—

Mr. McGohey: Your Honor, I do not desire an apology.

* * * * *

United States District Court

SOUTHERN DISTRICT OF NEW YORK

C-128-87

UNITED STATES OF AMERICA,

—against—

WILLIAM Z. FOSTER, *et al.*

REQUESTED MEMORANDUM OUTLINING FURTHER PROOF OF DEFENDANTS' CHALLENGE

Subject to the objections heretofore made and without waiving the same and subject to the reservations hereafter made, the defendants herewith outline the proof which defendants intend to offer and the manner in which it will be presented in further support of their contention that the undemocratic method of selecting jurors in the Southern District of New York has resulted in making that jury system the organ of the rich, the propertied and the well-to-do and in the systematic and deliberate exclusion of the poor and economically depressed, including manual workers, Negroes and other minorities from fair participation in that system, as more specifically set forth in the defendants' written challenge now before the Court.

First: The defendants will complete the proof of the allegations contained in the challenge and of the factual matter set forth in the affidavit annexed thereto and in the exhibits incorporated therein by reference.

Requested Memorandum Outlining Further Proof of Defendants' Challenge

Second: The defendants will establish by competent testimony and other evidence in respect to the 28 panels of jurors heretofore analyzed, and using the present Congressional Districts in Manhattan as a frame of reference; that;

a. The character of the areas in each such District (from 1940 to the present time) from which jurors have been and are drawn in whole or in substantial part and the character of the areas in each such district (from 1940 to the present time) from which no jurors or few, if any, jurors, have been drawn.

b. The areas first mentioned (in paragraph numbered (a) above) are areas which have the highest rentals in the district and contain most of the modern apartments and houses occupied largely by persons in the executive and professional classifications (as heretofore used in these proceedings) and by salaried clerical and sales employees; and that few, if any, Negroes, Puerto Ricans and other minorities reside in these areas.

c. The areas last mentioned (in paragraph numbered (a) above) are areas which contain, for the most part, tenement houses and other low rental dwellings occupied substantially by manual workers. This testimony and evidence will further establish the specific portions of these tenements and low-rental areas in which Negroes, Puerto Ricans or other minorities reside and the registered voting population in said Negro and Puerto Rican areas.

Requested Memorandum Outlining Further Proof of Defendants' Challenge

d. Additional evidence will be introduced by sufficient sampling as to each District to bring up-to-date the description of rents in the above areas as contained in the Market Analysis and Surveys which have been received in evidence (challenge Exhibits Nos. 20 and 87).

(NOTE: It is intended by this character of proof to establish for each of the Congressional Districts in Manhattan, the same type of factual data which, in respect of the 18th Congressional District, was testified to by Congressman Marcantonio. Additional testimony on this subject for the 18th Congressional District will be limited to showing the character of the residences of the three jurors inadvertently omitted by Congressman Marcantonio.)

Third: Defendants will present testimony and evidence to prove:

a. That the West Bronx and Riverdale areas from which jurors in the county of the Bronx are drawn in substantial quantity (areas which include substantially all of the 25th Congressional District and the westerly half of the 23rd Congressional District) are the highest rental areas of the Bronx and are areas in which relatively few manual workers and practically no Negroes or Puerto Ricans reside.

b. That the area known as the East Bronx, consisting of the easterly and southeasterly portion of the

23rd Congressional District and the entire 24th Congressional District and from which relatively few jurors are chosen, comprise the lowest rental area in the Bronx; consists largely of tenement houses occupied mainly by manual workers; and contains large concentrations of Negroes and Puerto Ricans, which concentrations will be delineated and described together with the registered voting populations of this area.

c. That the Parkchester area in the Bronx from which 37 percent of the jurors are drawn (challenge Exhibit No. 131) is a housing development containing 40,000 people embracing approximately 12,000 families; that Negroes are excluded from that development; that approximately 16% of the tenants are manual workers; that the remaining tenants are business, professional, clerical and governmental employees; and that the rentals in said development are comparatively higher than the rentals in the remainder of the east Bronx.

Fourth: In respect of Westchester County, defendants will offer testimony and evidence to establish the occupational distribution of the jurors residing in that County; where they reside within that County; and the character of the areas in which they reside. This will be done for 28 jury panel lists mentioned above and representative of the period commencing January 1940, to date. Proof also will be presented to show that the Westchester areas from which jurors are selected are the areas where the rich and

well-to-do people reside and those who are in the executive and professional classifications as these terms have been defined in these proceedings, and where practically no manual workers and Negroes reside.

Fifth: Defendants will present testimony and evidence to establish that, by design, the majority of those persons chosen from among the executive and professional classes, were, within their economic groups, among the highest-salaried and among those receiving the largest incomes in the Southern District of New York.

Sixth: Testimony and evidence will be offered to establish the actual occupation of the jurors; that such actual occupation is in substantial accord with the occupation of each as shown on the above-mentioned jury panels; and that the actual occupation of said jurors is in substantial accord with the occupational classification into which he was slotted in the analysis of the jury panels in evidence in this proceeding.

Seventh: Testimony will be presented to establish the race of the jurors, thereby showing virtual exclusion of Negroes and Puerto Ricans.

Eighth: Evidence will be presented to establish the specific methods which were decided upon, and which were used, to carry out the purpose of making the jury system in the Southern District of New York an undemocratic and unrepresentative system with the inclusions and exclusions set forth in the challenge; Said evidence will

establish how and in what manner, and during which periods of time, the attaches of the court went about the tasks and plan of compiling, or having compiled for them, lists containing large numbers of names of persons who thereafter were brought into the jury system as qualified jurors, some acting as grand jurors and some as petit jurors from time to time up to the present.

Ninth: Evidence will be presented to establish that the attaches of this Court, under the direction and supervision of the senior judge of this Court, embarked upon and carried out a plan to carefully select and handpick both petit and grand jurors, by methods that were completely undemocratic and contrary to law, and with the calculated purpose of achieving an unrepresentative and unlawful jury system, which result was achieved according to plan.

Tenth: Defendants will present testimony and evidence to establish that:

a. Pursuant to deliberate decision and design, there was adopted by the officials of this Court prior to 1940 an undemocratic and unlawful procedure for the selection of jurors, both grand and petit; that under this procedure, substantial numbers of names of persons who were qualified under law to be, and who had been serving as, jurors, were discarded from the files of active jurors as undesirable; that it was decided to heavily weight the jury lists with the names of persons who were rich and economically powerful, who moved in exclusive social circles, who resided in

neighborhoods in which neither working people nor Negroes and other minorities lived; and that said decision was carried out according to plan;

b. That arrangements were made by said Court officials and certain large corporations and financial institutions to the effect that such corporations and institutions would supply executive personnel and other specially selected employees of such corporations and institutions to act as jurors; that among the corporations with whom such arrangements were made, were large banking, trust and business companies; and that it was arranged for employees of such corporations to serve as jurors without loss of salary or wages;

c. That it was decided to resort to, and there was resort to, exclusive and select compilations of names of executives, directors, professional persons and people in the Social Register who were brought into the jury system as jurors; that said compilations excluded Negroes and working people; that the address telephone book of New York City has been continuously used since about 1940 to date to carefully select jurors from geographical areas in which manual workers, Negroes and other minority groups do not reside; and that voting lists have been discriminatorily used for the same purposes and with the same result.

Eleventh: Evidence and testimony will be presented to prove:

Requested Memorandum Outlining Further Proof of Defendants' Challenge

a. That the attaches of this Court kept and maintained separate files for grand jurors as distinguished from petit jurors and that names in said files numbering approximately 2,000 are repeatedly and exclusively used in compiling grand jury panels for this Court;

b. That it was decided to, and the Court attaches did, heavily weight the files containing the names of grand jurors with the most economically powerful and propertied persons obtainable within the Southern District of New York;

c. That a very substantial number of such persons are leading directors and executives of huge corporations largely in the utility, insurance and financial fields;

d. That a close liaison and work relationship was established between the Court attaches and a private organization known as the Federal Grand Jurors Association of the Southern District of New York, through the medium of which this Court was supplied with lists containing thousands of names of persons selected by said Association and unlawfully added to the files of grand jurors and petit jurors serving in this Court;

e. That it was decided to make jurors comprising the Grand Jury panels exclusive and un-representative of the people, and by reason thereof, it was arranged

to achieve, and there was achieved a composition of grand jurors which almost totally excluded manual workers therefrom and grossly overweighted the inclusion therein of economically powerful executives, directors, professional persons and wealthy people; members of exclusive social clubs or whose names were found in exclusive social registers, and the salaried employees of large corporations.

Twelfth: The factual data relative to the Federal Grand Jury Association set forth in the challenge and affidavit annexed thereto will be introduced in evidence together with the following additional facts relative to the same:

a. That the said Association has supplied numerous lists to the clerk of this Court for use in the selection of Grand and Petit Jurors;

b. That said lists were specially selected from and in the main were confined to wealthy persons, persons in the executive and professional classifications as described in this proceeding, the wives of such persons the salaried employees of large banking and utility corporations and specially selected manual workers employed by such corporations;

c. That said lists were in fact used by the Clerk in establishing and maintaining the jury lists from which grand and petit jurors are drawn;

d. That the said lists were and are not representative of a true cross-section of the community but were

intended to be used and were used in achieving the inclusions and exclusions set forth in the written challenge before the Court;

e. That many of the names so supplied by the said Federal Grand Jury Association have been and are still used by the Clerk of this Court in the selection of Grand and Petit Jurors;

f. That the said Association is comprised of approximately 600 former Grand Jurors still on the Grand Jury list maintained by the Clerk and represent one of the greatest concentrations of wealth and economic power in the Nation;

g. That the officers and governing and committees boards of the said Association are largely representative of the most powerful corporations in the United States, principally in the insurance, utility and financial fields;

h. That the lists furnished to the Clerk, and as used by him, are designed and have the effect of giving said corporations undue weight and influence in the selection of Grand and Petit Jurors, resulting in the overloading of the Jury lists with officers and salaried employees of such corporations and of others in like economic status and in the virtual exclusion of manual workers, Negroes, Puerto Ricans and other minority groups, as set forth in the challenge;

i. That said Association has had an active part in assisting Grand Jurors in the exercise of their duties

Requested Memorandum Outlining Further Proof of Defendants' Challenge

and powers under the law and the Clerk and Jury Commissioner in carrying out their obligations in the selection of Grand and Petit Jurors;

j. That such assistance was and is rendered in part by a "Panel" Committee of the said Association, specifically created for that purpose and using its influence and the influence of said Association to overload the lists and panels drawn from the same as aforesaid and to assist in creating the exclusions set forth in the challenge.

Requested Memorandum Outlining Further Proof of Defendants' Challenge

CONCLUSION

In addition to the foregoing the defendants reserve the right to present such additional, material and relevant evidence on any issues on this challenge which may arise in the course of presenting the above evidence and particularly out of the testimony of adverse and hostile witnesses, governmental or otherwise.

Dated, New York, New York, February 14, 1949

Respectfully submitted,

LOUIS F. MCCABE
Attorney for defendants William Z. Foster, Eugene Dennis & Henry Winston

HARRY SACHER
Attorney for defendants Benjamin J. Davis, Jr., Irving Potash & John Gates

RICHARD GLADSTEIN
Attorney for defendants Robert G. Thompson & Gus Hall

GEORGE W. CROCKETT, JR.
Attorney for defendants Carl Winter and Jacob Stachel

ABRAHAM J. ISSERMAN
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Office-Supreme Court, U. S.
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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 201

LIBRARY
SUPREME COURT, U.S.

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 175—October Term, 1949.

(Argued February 6, 1950 Decided April 5, 1950.)

Docket No. 21537

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. MCNABB, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Defendants-Appellants.

Before:

AUGUSTUS N. HAND, CLARK and FRANK,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From orders adjudging the above named defendants severally guilty of contempt and sentencing them to imprisonment, each of them appeals.

WOLF, POPPER, ROSS & WOLF, *Attorneys for Defendants-Appellants;* Paul L. Ross, New York City; Earl B. Dickerson, Chicago, Ill.; Charles J. Katz, Los Angeles, Cal.; Patrick H. O'Brien, Detroit, Mich., of counsel; Thomas D. McBride, Philadelphia, Pa., of counsel for appellant McCabe. Robert W. Kenny, Los Angeles, Cal., Joseph Forer, Washington, D. C., and Bernard Jaffe, New York, N. Y., on the brief.

IRVING H. SAYPOL, *United States Attorney, for the United States of America, Plaintiff-Appellee;* Frank H. Gordon, Irving S. Shapiro, and Edward C. Wallace, Special Assistants to the Attorney General, Lawrence K. Bailey, Attorney, Department of Justice, of counsel.

Briefs were filed by the following as *amici curiae* in support of the appellants:

NATIONAL LAWYERS GUILD; Robert J. Silberstein, counsel.

Various attorneys on their own behalf.

Various individuals, by WILLIAM L. STANDARD, Attorney; O. John Rogge, counsel.

Certain Trade Unions, by SAMUEL A. NEUBURGER, Attorney.

Certain Labor Organizations, by WITT & CAMMER, Attorneys.

AUGUSTUS N. HAND, *Circuit Judge*:

Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, and Gus Hall, were indicted in the United States District Court for the Southern District of New York for conspiring (1) to organize as the Communist Party of the United States a society teaching and advocating the overthrow and destruction of the United States Government by force and violence, and (2) to teach and advocate the overthrow of the United States Government by force and violence, contrary to Sections 3 and 5 of the Act of June 28, 1940, commonly known as the Smith Act. [Now 18 U. S. C. §2385.] A jury found the indicted defendants guilty of the offenses charged. The present appeal, however, is not from the judgment of conviction under the Smith Act but only from orders adjudging Sacher, Gladstein, Crockett, McCabe, Isserman, and Dennis, guilty of contemptuous conduct while acting as attorneys during the pendency of the main trial. The question before us here is not as to the merits of the convictions under the indictment but as to the impropriety of the conduct of Sacher, Gladstein, Crockett, McCabe, Isserman and Dennis, which resulted in the adjudication of contempt.

The trial began on January 17, 1949, but selection of the jury was delayed because of a challenge on behalf of the indicted defendants to the entire jury system as administered in the Southern District of New York. This challenge went on from January 17 to March 1, 1949. It finally terminated only when the court fixed a limit for its conclusion, and filed an opinion rejecting the challenge.[1] In that opinion it was held by the court that the

1 83 F. Supp. 197.

system administered in the Southern District was fair and made without discrimination of individuals or groups. After certain motions by defense counsel, the process of selecting a jury commenced on March 8 and was completed on March 17, 1949. Various witnesses for the prosecution were called between March 23 and May 19, when the Government rested after having called thirteen witnesses. The case for the defense was begun on May 23 and concluded, after hearing thirty-five defense witnesses, on September 23. Upon summation by counsel, the court charged the jury on October 13, who rendered a verdict of guilty against all the indicted defendants.

Upon entry of the verdict on October 14, the court announced: "Now I turn to some unfinished business," and proceeded to read a portion of a contempt certificate and orders, made under Rule 42(a) of the Federal Rules of Criminal Procedure, convicting the appellants of criminal contempts of court and imposing sentence. These orders imposed a sentence of four months imprisonment on Crockett and Isserman, thirty days on McCabe, and six months on Sacher, Gladstein, and Dennis. The certificate and orders were filed with the clerk immediately after the oral announcement. Each order recited that the named appellant was guilty of the contempts specified against him in the certificate, and sentence was imposed for each contempt with the direction that the sentences be "served concurrently." After the certificate and orders were made, each appellant addressed the court. Isserman objected to the findings in the certificate on the ground they were 'wholly unwarranted by anything which has occurred in the course of this trial"; and, in respect to himself, were "but a reflection of the atmosphere of bias and prejudice which this court has shown and with which this entire trial was attended from the first day." He also argued that this was "an effort to intimidate members of the bar in their bounden duty to

represent their clients to the best of their ability * * *" He ended by making a motion to vacate the certificate, which was denied.

Sacher recognized that "the power rests in the Court to act summarily," but added that the lawyers should be given "an opportunity to be heard before they are found guilty and sentenced." To this the court replied: "Let me say this to you, Mr. Sacher: as to these contempt adjudications, let them be notice to you and to all who may be tempted to follow your example that there is power in the judicial system of the United States under the Constitution and the laws of the United States to protect and maintain the dignity of the court * * *"

Thereupon, Gladstein stated that he had committed no contempt of court and had done no more than defend the rights of his clients. Crockett made a similar statement, as did McCabe. Finally, Dennis said that: "This trial and the verdict, is an evil and an illegitimate product of a bipartisan conspiracy * * * of men who want to destroy the Bill of Rights and peace, and I think that the adjudgment of counsel * * * is in keeping with the sinister and police state character of this trial."

A copy of the certificate which the judge filed under Rule 42 (a) is set forth as an appendix to this opinion.

In preparing and filing the Contempt Certificate, and imposing the sentences, the court purported to act under summary powers conferred by 18 U. S. C. §§401 and 402.[2]

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[2] "§401. Power of court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

Rule 42 of the Federal Rules of Criminal Procedure provides:

"Rule 42. CRIMINAL CONTEMPT.

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant

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(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

§402 provides that certain contempts shall be prosecuted by jury trial, but concludes:

"This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law."

is entitled to trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

In discussing the power to punish without notice or hearing contempts committed in the presence of the court, Justice Harlan said in *Ex parte Terry*, 128 U. S. 289, 306:

"* * * upon the facts recited in the order of September 3, showing a clear case of contempt committed in the face of the Circuit Court, which tended to destroy its authority, and, by violent methods, to embarrass and obstruct its business, the petitioner was not entitled, of absolute right, either to a regular trial of the question of contempt, or to notice by rule of the court's intention to proceed against him, or to opportunity to make formal answer to the charges contained in the order of commitment. It is undoubtedly a general rule in all actions, whether prosecuted by private parties, or by the government, that is, in civil and criminal cases, that 'a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' *Windsor* v. *McVeigh*, 93 U. S. 274, 277. But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tri-

bunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law."

See also the remarks of Chief Justice Taft in *Cooke* v. *United States*, 267 U. S. 517, 534, to similar effect.

The appellants contend that the judge had no power to punish the defendants summarily because the conduct punished was not "committed in the actual presence of the court," and also because of the punishment imposed did not immediately follow the contemptuous acts. As for the first objection, it seems to be met by the findings in the certificate and many portions of the record that the judge had before him. The second objection we shall deal with after discussing the first. Neither of them, however, seems persuasive.

The argument in support of the first contention is largely based upon the preliminary remarks in the certificate, in which the judge said:

"Before the trial had progressed very far, * * * I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial;

and (3) impairing my health so that the trial could not continue."

The judge also said in his preliminary remarks that he would have overlooked the contemptuous conduct of counsel, or would have at most merely reprimanded them, if their conduct had appeared to be the result of the heat of controversy or zeal in the defense of a client rather than deliberate contempt. The appellants argue that the judge punished them because he found they were engaged in a conspiracy though he could not have witnessed the actual making of a joint agreement. But if the appellants' conduct described in the certificate was contemptuous and obstructive and involved contumacious acts at the trial, those acts were committed within the judge's sight and hearing. The judge's conclusion that they were the result of an agreement meant no more than that they were deliberate, and it was quite unimportant whether he believed that a prior conspiracy had been entered into. Indeed, he never said that such a conspiracy had been formed. He saw and heard the appellants deliberately delaying the trial, disregarding his orders, and accusing him of wrong-doing and corruption. This was enough to show wilful obstruction of the trial. There is nothing in his certificate indicating that there were any acts other than those which he saw and heard that determined his conclusions. Even if he regarded the appellants' conduct as the result of an agreement made outside the courtroom, that view is unimportant and would not limit his power to impose summary punishment for contempt. His punishment could no more be revised because he held that view than could a sentence for an ordinary crime be reversed because the judge felt and said that a defendant had shown himself such an undesirable citizen in other transactions as to merit the imposition of unusually severe treatment. His reason for the length of the sentence

would not affect its validity and should be ignored on appeal. The situation in *Townsend* v. *Burke*, 334 U. S. 736, was quite different, for it there appeared that the fact which caused the judge to impose a long sentence was his erroneous information that the defendant had been previously convicted on certain charges, and that a sentence affected by that mistake was imposed upon a defendant who did not have the benefit of counsel.

The record appears to justify the findings in Specification I of the Certificate that the appellants "joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial * * * for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute. * * *" It likewise bears out the findings of obstructive and contemptuous conduct with which the defendants are charged in subdivisions *a.* to *m.* of that specification. There seems to have been ample reason for the court's conclusion that the attacks on Judge Knox and the other judges of the Southern District and on the jury system, the Justice Department, the police, the newspapers and the President of the United States were launched with a similar purpose to divert the jury from the real issues, and to convert the case into a trial of the Government, rather than the indicted defendants.

When the indictment was moved for trial on January 17, 1949, defense counsel asked for a 90 day continuance on the ground that armed police in the Court House and newspaper accounts would prevent a fair trial. They also asked for a courtroom larger than the one in which the court was sitting so as to admit a larger public. On the denial of these motions the court on January 18 began consideration of the defendants' challenge to the jury

panel and to the jury system as administered in the Southern District of New York—a challenge which it entertained although a similar one had been made on November 12 and withdrawn on November 16 preceding. Counsel then contended that the challenge should not be heard by any judge of the Southern District of New York, and in any event that Judge Medina should not sit because they might desire to call him as a witness. The judge stated that he had not participated in the local jury system, to which Sacher replied that even if he had not participated, a "lack of participation might legally, despite its paradoxical aspect, be regarded as participation * * *."[3] After counsel had separately refused to state whether they expected to call the judge as a witness, he ruled that if called he would refuse to testify. Such conduct by appellants was dilatory and obstructive. They then proceeded to call a member of the petit jury panel for the January 1949 Term named Allen and asked him what was "the assessed valuation of the home" in which he lived. The judge ruled that the witness might be asked whether he owned property in excess of the amount required to qualify for jury service, but could not be asked in detail of what his property consisted. After protracted arguments by Sacher, McCabe and Isserman, the original ruling was adhered to, which precluded details as to the juror's economic status. In spite of this, Isserman and Sacher continued to interrogate the witness as to details of his property holdings, his income, other information such as had been excluded by the court in previous rulings, and many quite irrelevant matters. These questions continued over many pages of the record. The prior rulings and objections were entirely sufficient to protect any rights which the indicted defendants had on appeal, and the repeated questions ap-

3 Challenge Transcript, p. 1356.

pear to have involved obstructive and dilatory tactics. In spite of this, the appellants called three more witnesses who were members of the petit jury panel and subjected them to the kind of detailed questions which had been excluded in the case of Allen. Upon the calling of Flanagan, a fifth member of the petit jury panel, the judge ruled that he would hear no more members of that panel until some direct proof of discrimination was furnished. Long and repetitious arguments then followed protesting against the rulings of the court and covering many pages of the record. Thereupon, the defendants' counsel called one Wilkerson, who testified that he had supervised the preparation of the statistics purporting to show disproportionate and discriminatory selection of the jurors in the Southern District.

On February 4, a question was asked and excluded, with repetitious and concerted arguments against the ruling by Isserman, Gladstein, Sacher, and McCabe.[4] Later during the same day, after a further question had been excluded by the judge, arguments of like character were made by Isserman, McCabe, Sacher and Crockett.[5] One has only to read these and many other arguments against the judge's rulings to be convinced that the conduct of the appellants was concerted and wilfully obstructive. At length on February 8, the court remarked:

> "* * * There has been a wilful, deliberate and concerted effort here to delay the proceedings. And I am going to see what I can do to prevent any further delay. * * * At first I couldn't think it possible, and then it began to dawn on me that maybe that is what was going on. And I mentioned it two or three times but

4. See Appendix, Specification VI.

5. See Appendix, Specification VII.

it did not have any effect. And finally it has come to my mind that such is the fact, and I so find.'"

Later the court said:

> "The finding I made the other day was based not only upon occurrences that appear in the minutes but upon what I have observed in the conduct of counsel before me here, sneering, snickering, obvious indications of one to another, 'Get up, it is your turn now, go at it next, keep this thing going,' and so on:'"

In spite of this, counsel continued their arguments and objections regardless of the ruling of the court that an objection by one would inure to the benefit of all. On February 25, the judge had been so overwhelmed by talk that he ruled that he would receive no further argument on motions and objections, except where he requested it, and directed the defendants so to limit their proof on the jury challenge, that the trial could begin on March 7.

After the challenges were rejected and the actual trial had begun on March 7, a new motion for an adjournment of 90 days was made and denied. Moreover, Gladstein again attempted to challenge the array of jurors and to dismiss the petit jury panels of March 1 and March 7, and to introduce evidence and argue about these matters. Thereafter, there were repetitious objections and arguments on the question of the allowance of what appellants claimed were the proper number of peremptory challenges, and protests because of the examination of jurors on the *voir dire* by the court rather than by counsel. Further attacks upon the petit jury panel, with irrelevant allusions to the socalled "Jim Crow" policy of the Metro-

6. Challenge Transcript 2839.

7 Challenge Transcript 3175.

politan Life Insurance Company in its Stuyvesant Town development, were made, and there were irrelevant arguments by Dennis as to the Chinese situation, the Greek situation, the State of Israel, German and Japanese monopolies, and the Marshall Plan. Repetitious arguments were made by Dennis, Sacher, Isserman, McCabe, Gladstein, and Crockett about taking the deposition of Foster, as to whom the case had been severed.

There were motions, accompanied by lengthy and repetitious argument, to strike out practically all the testimony of the first Government witness Budenz and the exhibits introduced during his examination. On April 4, Gladstein persisted in pressing a line of cross-examination of Budenz which the judge had ruled out, and made insistent arguments when told to turn to other questions. On the same day, after Isserman had embarked on repetitious argument under the guise of stating his grounds of objection, the court ruled that neither Government nor defense could argue or state grounds of objection without permission of the court.

On April 25, when the judge had limited the introduction of a book by Karl Marx on "Value, Price and Profit" to such portions as might be shown to be relevant, repetitious objections were made by Gladstein, Sacher, and Dennis, until the judge was forced to leave the bench temporarily in order to stop the refusal by Dennis to obey his orders to abstain from argument.

On May 11, the judge announced that out of 8860 pages of the record already made, at least 1554 pages represented argument by defense counsel, without counting the testimony or what had been said by the attorneys for the Government, or by himself. In addition to persistent argument—often contrary to direct command of the court—the record shows frequent provoking statements and objections by the appellants concerning trivial matters.

On May 17, the judge said that he had "observed a number of things here which have impressed me as having been done solely for purposes of delay, perhaps to drag out this case for an indefinite period: * * * Now, for example, I have observed as to exhibits, that an extremely long period is taken for the passing around of the exhibits, turning them over and over and passing them around, and 20 minutes or a half hour go by; and it seems to me that perhaps we can be a bit more expeditious."[8]

On June 3, one of the indicted defendants, Gates, was remanded to the custody of the marshal for refusing to answer a question on the witness stand, and the indicted defendants Hall and Winston were likewise remanded for the balance of the trial. The latter two, as well as Dennis, acted in an obstreperous and contemptuous manner. In the turbulent scene which accompanied the rulings of the court, none of the appellants attempted promptly to restore order. Indeed, Gladstein, when asked by the judge if he did not think it would be prudent for the defendants to resume their seats, insisted that the court first rule upon his frivolous claim that the question put to Gates about the names of persons who were members of a committee involved a violation of Constitutional rights.[9] This court has since held that the question was proper, and that the refusal to answer it was a contempt, and has affirmed Judge Medina's orders remanding Hall and Winston, and punishing Gates.[10]

On August 3, during the direct examination of Mrs. Lightfoot by Isserman, she was asked some questions by

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8 Trial Transcript, p. 5827.

9 See Appendix, Specification XXVII.

10 *United States* v. *Hall*, 176 F. 2d 163, cert. den. 338 U. S. 851; *United States* v. *Gates*, 176 F. 2d 78.

the court which Gladstein constantly objected to for no valid reasons. Finally, the questions were abandoned because of sheer obstruction whereupon Dennis ended the incident by moving for a mistrial because of the alleged hostile attitude of the court to the witness.

Throughout the remainder of the trial, there were persistent obstructive colloquies, objections, arguments, and many groundless charges against the court by the appellants of judicial misconduct. But since Judge Clark is of the opinion that none of the specifications should stand, and Judge Frank has concluded that the first specification should not stand, the orders will be affirmed upon the basis of certain later specifications.

SACHER

The following additional findings of contemptuous acts and misconduct by Sacher are contained in the later specifications of the judge's certificate:

In Specification II, he charged that if the court was not to allow questions as to the economic status of the petit juror Allen, "this hearing is no hearing; it is just a sham and a pretense designed to prevent the establishment of those facts which will prove that the system is precisely what we say it is."

In Specification V, he said: "This is an Alice in Wonderland procedure. We always get the sentence first and then the trial. * * * Is it because the evidence is becoming too devastating for the Government that we must now be circumscribed? * * *"

In Specification VI, he charged the judge with making certain rulings because of the presence in court of a large number of newspaper reporters.

In Specification VII, he indulged in persistent argument that the judge should change his ruling and permit

general testimony as to the qualification of the inhabitants of the 18th Congressional District for jury service. This he did in addition to the argument to the same effect by Isserman, McCabe and Crockett.

In Specification VIII, he insolently suggested that the judge was favoring government counsel by giving the latter advance notice of when he would be called upon to proceed with his proof in respect to the challenge to the jury system.

In Specification XII, he made a sarcastic reference to Judge Knox which was accompanied by a somewhat similar reference by Isserman to Judge Medina. Neither remark was calculated to do anything but annoy the court and confuse the issues.

In Specification XIV, he charged the court with making a provocative remark, and added that "lawyers who are defending their clients for their liberty should not be treated as though they were dogs in the courtroom * * *"

In Specification XVI, he said that: "No observations from the bench" would change his form of procedure. And when the court added that "you never can tell what will happen," Sacher replied: "With your Honor up there I suppose that is true."

In Specification XVII, he charged the court with preferential and unfair treatment by saying: "I see, only Mr. Gordon and Mr. Nicodemus may speak."

In Specification XIX, after argument by Gladstein and Dennis in support of the introduction in evidence of an entire book, Sacher impertinently remarked: "* * * we are being stopped from proving the truth."

In Specification XXV, he indulged in argument with the judge contrary to the latter's rulings.

In Specification XXVII, Sacher, instead of trying to quell the uproar when Gates had been remanded by the court, joined in making the absurd contention that Gates

was entitled to disobey the court by invoking rights under the Fifth Amendment to the Constitution.

In Specification XXVIII, he again was reprimanded for argument and shouting.

In Specification XXIX, he claimed that the witness Green was being "crucified unnecessarily with interrogations."

In Specification XXX, he interjected in respect to the cross-examination of the defendant Green, though he did not represent the latter, "I would like to quote the court and say: 'This is very small pickings.'"

In Specification XXXI, he accused the court of "[unjustified] remarks * * * designed to prejudice the jury against the defendant."

In Specification XXXIII, he virtually accused the court of an unjust ruling and persisted in arguing.

In Specification XXXVI, he persisted in argument and in effect charged the court with favoring the Government counsel.

In Specification XXXVII, he charged the court with seeking to prejudice the jury against defense counsel.

In Specification XXXIX, he impertinently said: "Will there come a day, your Honor, when you will hear us?"

In respect to Specifications XV and XVIII, which are printed in the Appendix, the gist of each charge seems to be that Sacher was attempting to mislead the court. This we do not think is sufficiently clear and we, therefore, hold that the convictions under Specifications XV and XVIII, as well as under Specification I, should be reversed, but that his other convictions should be affirmed.

Sacher's contention that on January 26, 1949, the judge exculpated him from any charge of misconduct when he said that Sacher had thus far spoken "in good taste" would, at most apply only to Specification II, and leaves him

vulnerable as to that specification in view of his many later acts of misconduct which colored prior transactions.

GLADSTEIN

The following findings, in addition to those of Specification I, were made as to Gladstein:

In IV, during the challenge to the jury system, he charged the court with prejudgment; and later, when invited to submit a memorandum of law, said that he would "if there is any possibility of having the effect of [the] authorities respected." Upon the court's criticizing him for his impertinent insinuations, he added: "It isn't half of what I felt like saying, your Honor, as a result of what you said."

In VI, he contemptuously persisted in burdensome argument.

In VIII, during the jury challenge, he in effect angrily charged the judge with keeping out evidence because he didn't like the way Gladstein and his colleagues had been behaving.

In X, he asked the judge to reconsider his ruling with respect to a document which he had declined to admit in evidence, and said: "upon the pretext that this is a confidential document, * * * you are preventing me from showing * * * the corruption of the system here in so far as they placed in charge of it a man who was the director of a dozen corporations, * * *." In spite of a reprimand by the judge and his direction to desist from arguing, Gladstein continued.

In XI, after the court had excluded Gladstein's offer of "Poor's Register of Directors," he said: "I thought when you heard the facts you would, Judge."

In XII, during the cross-examination by the Government of the witness Darr, Gladstein made persistent arguments

and objections, and after the court had overruled them and instructed the witness to answer questions and not make a speech, as he had done, objected "to the Court's gratuitous and improper characterization of the witness' testimony, as an effort to make a speech * * *"

In XIII, he persisted in arguing in support of questions which had been ruled out by the court, and, after directions by the latter to desist, said: "They do represent the truth and I intend to show that they do."

In XVIII, Gladstein argued in the presence of the jury that the court should tell them that the witness Nicodemus, whose credibility was being attacked by the defense, was guilty because he had had to pay costs, although the court had held that the payment of costs did not affect a final judgment that Nicodemus was not guilty.

In XX, he offensively charged the judge with sustaining anticipated objections to his questions before the objections were stated. It was in effect a charge of bias.

In XXIII, he again charged the court with impropriety and partiality.

In XXIV, he persisted in argument, though it had been forbidden.

In XXVI, when the court again stated that it did not desire to hear arguments unless it requested them, he said that "the Court is now making it plain that it no longer wishes to hear evidence from the defendants, and that began to be true when the defense began to put in its case."

In XXVII, when there was disorder in the courtroom upon the sentencing of Gates for refusal to answer questions as directed, the judge suggested that it would be "prudent if the defendants resumed their seats." But Gladstein proceeded to argue that Gates had the right to disobey the court's direction because of immunity under the Fifth Amendment to the Constitution.

In XXXI, during the cross-examination by the Government of the witness Yolanda Hall, Isserman, Gladstein, Dennis, and Sacher in succession interrupted, argued, and made vexatious objections. When the judge tried to curb them, they moved for a mistrial, and claimed the court was prejudiced.

In XXXII, during the direct examination of Geraldyne Lightfoot by Isserman, he and Gladstein by obstructive tactics succeeded in preventing her from answering a question by the court. Gladstein charged the court with bullying the witness, and made unreasonable objections in which Dennis finally joined. Gladstein charged the court with "misconduct," and when the Government attorney stated that there had been no badgering of the witness, impertinently remarked that he was "willing, if your Honor will permit, to have a poll taken of the members of the jury and the people of the press and the people in attendance * * *" The acts set forth in XXXII, were clearly outrageous and prevented an orderly trial.

In XXXIV, after the judge ruled on a question put to the defense witness Thompson, Gladstein proceeded to argue against the ruling and charged the judge with partiality on the ground that he had made an inconsistent decision when the government witness Budnenz was being examined.

In XXXV, during the direct examination of the witness Strong, the court sustained an objection to a question by Gladstein and stated that it wanted no argument; whereupon Gladstein, in an improper aside to the jury, said: "Well, that is no secret."

All of these convictions of Gladstein were supported by the facts and should be affirmed.

CROCKETT

The following findings, in addition to those of the first specification, were made as to Crockett:

In III, he impertinently charged the judge with favoring the United States Attorney over the attorneys representing the indicted defendants.

In VII, after the judge had warned defendants' counsel that he wished no more argument, Crockett continued the arguments already made by Isserman, McCabe and Sacher, until warned that he was acting in defiance of the court's request.

In XXI, he suggested that the court had improperly obtained knowledge of the Government's evidence, saying: "I don't think it is customary for the Court to show such familiarity * * * with proof that the Government might present."

In XXII, he improperly charged the court with prejudicial rulings and bias.

In XXVII, the disorder in the courtroom accompanying the sentence of Gates and the remand of Winston and Hall was in no way relieved by Crockett, who joined the other attorneys and the indicted defendants in rising in the courtroom, and made no attempt to have his clients Winter and Stachel resume their seats.

In XXIX, in the course of the examination of Gates, he offensively and irrelevantly said in the presence of the jury: "May the record show that this is the fifth day of the witness' imprisonment in jail."

In XXXVII, he persisted in objections in spite of the previous rulings of the judge and warnings that argument was not desired.

In XXXVIII, he obstructed the trial by continuing argument and charging the judge with having a mind

"closed to any grounds that I might state." He also offensively remarked that the judge's mistake in reading too much of an exhibit to the jury was "seemingly unintentional."

All of these convictions of Crockett are supported by the record and should be affirmed.

McCABE

The following findings, in addition to those of the first specification, were made as to McCabe:

In VI, after protest by the court at reiterated arguments and discussions of the latter's rulings by Gladstein, Sacher, and McCabe, McCabe made the offensive suggestion that the judge's observation that counsel were trying to provoke him and were wasting time "may very well be addressed to someone outside of this courtroom, * * *"

In VII, —in company with Isserman, Sacher and Crockett—he continued to argue after it was clear the court desired no further argument.

In VIII, he sarcastically remarked that "the way in which this case has been conducted is one which I certainly hoped I would never see in a court of justice."

In IX, he charged the judge with picking 11:20 and 3:20 for statements by the latter that counsel were wasting time because 11:30 and 3:20 were deadlines for the newspapers. Later," when the court warned him about his conduct and said that it would not be dealt with then, but would be later, he reiterated that his earlier charge that rulings were made for newspaper deadlines "was accurate."

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11 Trial Transcript, p. 6980.

In XXVII, upon the sentence of Gates and the remand of Winston and Hall, he failed to take any steps to help restore order in the courtroom.

All of these convictions as to McCabe are supported by the record and should be affirmed.

ISSERMAN

The following findings, in addition to those of the first specification, were made as to Isserman:

In VI, after the judge during the challenge to the jury system had sustained an objection to questions regarding low-rent housing projects and had told Isserman that he did not wish to hear arguments, Isserman, notwithstanding, proceeded to argue in conjunction with Gladstein, Sacher, and McCabe.

In VII, Isserman persisted in argument, and charged the court with misconstruing a statement that he had made and with improperly characterizing his conduct.

In XII, he interjected the sarcastic comment that the membership of the witness Darr in American Youth for Democracy had no more bearing on Darr's credibility than the fact that the judge was "in the Social Register."

In XXVII, he was charged with making no attempt to quell disorder when Gates was sentenced for refusing to answer a question and Winston and Hall were remanded for turbulent conduct. Instead of this, Isserman furthered the futile argument that Gates was entitled to disobey the order of the court because of his rights under the First and Fifth Amendments.

In XXXI, when the court admonished Isserman not to argue, he objected to the holding of the court that his action was deliberate and moved for a mistrial.

The cross-examination of the witness Yolanda Hall was constantly interrupted by objections and arguments from Isserman, Gladstein, Sacher, and Dennis.

In XXXII, during the examination of the witness Lightfoot by Isserman, the latter said that a question by the court made the defense "impossible," and, with the support of Gladstein, succeeded in blocking the inquiry.

All of these convictions as to Isserman are supported by the record and should be affirmed.

DENNIS

The following findings, in addition to those of the first specification, were made as to Dennis:

In XIX, he persisted in argument contrary to the instructions and warning of the court. In this connection the judge found it necessary to adjourn for five minutes to prevent Dennis from continuing to flout his direction.

In XXII, Dennis charged the court with an "outrageous and arbitrary ruling" because the defendants were not granted an adjournment after the Government had completed its case, and characterized one of the court's rulings as a "mockery of justice" and as a prejudgment of the case. He also made other violent characterizations of the judge's action.

In XXXI, he asked whether "the ruling and remarks of the court are directed to the defendants and counsel as to prejudice our case before the jury?" He further stated that "for all intents and purposes the defendants are deprived of counsel and deprived of what is set forth in the Sixth Amendment to the Constitution."

In XL, he charged the court with an "act of gross discrimination and an affront to the Negro people" because the judge had refused to allow Davis to sum up rather than the latter's attorney.[12]

12 The reasons for the refusal to allow Davis to sum up are set forth in the opinion of Judge Medina reported at 9 F. R. D. 367, 371.

All of the convictions of Dennis are supported by the record and should be affirmed.

It is evident from the specifications in the certificate that the judge was confronted with many contemptuous remarks by the appellants and many obstructive refusals to obey his orders. However, he took no immediate action to punish them for contempt. If he had done so, the result would have been to leave the indicted defendants without effective counsel or with the necessity of choosing new counsel—a procedure involving interminable delay. He therefore abstained from any immediate punishment but again and again warned the appellants that their conduct was improper. Illustrative of such warnings, is his statement to McCabe on June 3: "[Were] it not for the fact that I have determined that this trial shall not be disrupted by such things I should have taken action against you and against each of your colleagues long before this, but I shall not do it. I shall leave that to the proper authorities to take care of in due course, and there it shall rest, but you need be under no misapprehension; I have been quite fully cognizant of your contemptuous conduct and your impudence."[13] Many of the occasions on which he warned them are set forth in the margin.[14]

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13 Trial Transcript, p. 6980.

14 For warnings addressed to the attorneys as a whole, see, *e.g.*, challenge transcript pp. 2546, 2621, 3433; trial transcript pp. 5443, 5872, 6980 (quoted above), 7275, 11031. Many warnings were also addressed to individual counsel. As to Sacher, see, *e.g.*, challenge transcript pp. 2495, 2621, 2684, 3175, 3420, 3872; trial transcript pp. 2480, 3650, 6532, 7124, 8895, 10766, 11578, 12823, 13338, 13894, 14241. As to Gladstein, see, *e.g.*, challenge transcript, pp. 4398, 4560, 4562, 4591; trial transcript pp. 3767, 5443, 6461, 6462, 6838, 11275, 11276, 11819, 13169. As to Crockett, see, *e.g.*, trial transcript pp. 829, 3940, 5161, 6055, 7191, 14223. As to McCabe, see, *e.g.*, challenge transcript pp. 2621, 2625, 4117; trial transcript pp. 422, 6980. As to Isserman, see, *e.g.*, challenge transcript 2546, 2623, 3624, 3289; trial transcript pp. 11031, 11273. As to Dennis, see, *e.g.*, trial transcript pp. 3939, 5827, 6049, 6976.

We now reach the appellants' second objection based on their contention that the judge could only impose summary punishment immediately upon the commission of their acts of contempt. The validity of such an objection was left open in *Ex parte Terry*, 128 U. S. at 314, and again in *Pendergast* v. *United States*, 317 U. S. 412, 419. The appellants argue on this appeal that the judge could not withhold summary punishment until the end of the long trial, and rely largely on the language of Mr. Justice Holmes in his dissenting opinion in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 423, where he said that to his mind the words of the statute "point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity * * *". Likewise in his dissenting opinion in *Craig* v. *Hecht*, 263 U. S. 255, 280, he said: "It seems to me that the statute on its face plainly limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work." But in these opinions the Justice was only dealing with criticism of the judge outside the court during the pendency of a suit and was saying that such criticism was not within the prohibition of the statute because it was not in the presence of the court or "so near thereto as to obstruct the administration of justice." That view the Supreme Court has sanctioned in *Nye* v. *United States*, 313 U. S. 33. But it has expressly left open the question whether, where a judge has power to punish without notice and hearing a contempt in open court, he must impose sentence immediately after the contempt is committed. This is the question before us.

Not only did the remarks of Justice Holmes, which we have quoted from 247 U. S. at 423, and 263 U. S. at 280, relate to situations that are not before us here, but his

statement that the language of the statute points only to the "present protection of the court from actual interference" and confines its jurisdiction to cases "where his personal action is necessary * * * to enable him to go on with his work" can hardly be applied literally to every case since no summary punishment can prevent obstructive acts already completed inasmuch as it must follow them. For example, in the *Terry* case the misconduct was complete and the particular case was over, so that summary punishment was not necessary to enable the court "to go on with" its work; yet it was imposed. The quoted remarks of Justice Holmes were evidently intended to give salutary warning against the unnecessary exercise of the power to punish for contempt and did not contemplate a case like the present, where it would have been necessary either to abandon all attempts to curb disorderly and contemptuous conduct or very seriously to interfere with the progress of the trial. The course adopted by Judge Medina warned the appellants that they were misconducting themselves at their peril. It tended to prevent further obstruction, and also demonstrated that its orders and warnings were not in vain by punishing the offenders, after the verdict was recorded, for flouting its authority. Any other treatment of the contemptuous action would have been self-defeating.

The opinion of Chief Justice Taft in *Cooke* v. *United States*, 267 U. S. 517, should be read in the light of the facts of the case before him. When he spoke, at page 536, of "immediate penal vindication of the dignity of the court," we think that he meant as speedy vindication as was practicable under the circumstances, and could not have required steps which would have broken up the trial or frustrated the powers of the judge to vindicate his authority after it had been flouted in open court. Nor do we think that the language of the Supreme Court

"Now, I must in all candor say, your Honor, that it is very difficult for us among the defense counsel to believe that the United States Attorney was caught unawares in the request or the direction which the Court made to him to proceed with his proof on an hour and half's notice——"

Other counsel proceeded to object, which led the Court to remark that the way the hearing was conducted was such as he never thought he would see in a court of justice (Ch. Tr. 3433). Thereupon, Mr. McCabe in a sarcastic tone said (Ch. Tr. 3433):

"I will agree, your Honor, on that last point; the way this case has been conducted is one which I certainly hoped that I would never see in a court of justice.

The Court: You mean the way it has been conducted by me, I take it.

Mr. McCabe: I mean that exactly."

The Court stated (Ch. Tr. 3434):

"I have been subjected to every kind of vituperation here and you might just as well tell me how I am going to be reversed and all that. It remains to be seen what will be done by higher courts, and your telling me about that isn't going to affect my judgment. I am trying my best here to rule justly, to rule impartially, to protect the rights of these defendants despite the conduct of their counsel, and I shall continue to do that."

Mr. McCabe followed this with the statement (Ch. Tr. 3434):

"I rise simply to say—to except to your Honor's characterization that anything the defendants' attorneys have done is sabotage. Sabotage there has been,

but as I say I think it has been a sabotage of the entire system of justice in this court, and I say that we are the only ones who seem to be interested in that."

Thereupon, Mr. Gladstein jumped to his feet and, angrily advancing toward the bench, he said in a truculent manner (Ch. Tr. 3434-3435):

"Well, now may I ask your Honor this: does your Honor really mean that the record shall indicate that it is a protection of the rights of these defendants for your Honor to say when I offer a piece of evidence, 'Mr. Gladstein, that would be material, that would be relevant, that would help to prove your case, but I am not going to let you put it in evidence because I don't like the way you and your colleague lawyers have been behaving?

The Court: Did I say that?

Mr. Gladstein: In effect, yes, because you have absolutely rejected and you have prevented me from introducing evidence——"

IX.

On February 18, 1949, during the defendants' challenge to the jury system, Mr. McCabe diverted the course of his argument to remark (Ch. Tr. 4116-4117):

"I would like to say to your Honor that I really have come to believe that the constant repetition by your Honor at intervals which are almost as regular as the tolling of Big Ben—and I mean nothing personal in the allusion—or the eruption of Old Faithful out in Yellowstone Park, or wherever it is—these come at stated periods. I think you can pick 11.20 and 3.20 when these statements come that we are delaying; we

in *In re Oliver*, 333 U. S. 257, 274, contemplates the limitation which appellants' counsel contend for. There is no doubt that the power to punish summarily without a hearing should be exercised with great circumspection. We are in no way indicating that a lax, importunate exercise of it ought to be sanctioned. We merely hold that the acts of these appellants were intolerably obstructive to an orderly trial and merited summary punishment, and that the mode of dealing with them adopted by the court was justified under the circumstances.

The conclusion we have reached in overruling the appellants' second objection is borne out by a decision of the Ninth Circuit,[15] and by several decisions in the state courts where summary punishment for contempt was imposed under statutes similar to the one governing the case at bar. They are all to the general effect that the punishment should follow the acts of contempt with reasonable promptitude, but that the degree of promptitude depends upon the particular facts of each case, and that the punishment need not follow immediately if such an imposition would endanger the defense in a criminal case, or interfere with its conduct. We cite these decisions in the margin,[16] and in addition quote from the opinion of the Supreme Court of Minnesota[17] which clearly states the reasoning applicable to cases involving the summary disposition of contempts committed in open court:

> "Jurisdiction to punish for a direct contempt attaches the instant the contempt is committed, and continues at least so long as may be necessary to afford the court a reasonable opportunity to vindi-

15 *In re Meury*, 205 Fed. 626.

16 *Middlebrook* v. *State*, 43 Conn. 257;
In re Cary, 206 N. W. 402 (Minn.);
In re Willis, 162 Pac. 38 (Wash.).

17 *In re Cary*, *supra*, at 402.

are doing nothing; your Honor has seen nothing in the record. I say, I don't want——

The Court: What is the point of ~~those~~ times, of those particular times?

Mr. McCabe: 11.30 I think is the deadline for the afternoon papers, your Honor, and I think around 3:20 is the deadline——"

The Court (Ch. Tr. 4117):

"Well, that is something I had no idea of, and I must say you have got an ingenious mind to suppose that something was said for such a purpose. I think you ought to be ashamed of yourself."

See also Tr. 6980.

X.

On February 28, 1949, during the challenge to the jury system, Mr. Gladstein asked the Court to reconsider its ruling with respect to a document which he had sought to have admitted into evidence. The Court adhered to its prior ruling and stated it did not desire to hear further argument (Ch. Tr. 4559). Mr. Gladstein refused to heed the direction of the Court, as follows (Ch. Tr. 4560-4562):

"Mr. Gladstein: But, your Honor, *upon the pretext that this is a confidential document*, the one that I am asking about, the one that was written by this witness, *you are preventing me from showing* without any question the final proof of the corruption of the system here in so far as they placed in charge of it a man who was the director of a dozen corporations, who——

The Court: Mr. Gladstein——

Mr. Gladstein: May I finish, Judge?

The Court: I consider your language offensive and not fitting for an officer of this court to use when you

cate its authority at a time and under circumstances where its action will have no untoward effect upon the business in which the court was then engaged. A court may, and usually does, impose punishment for a direct contempt at the time the offense is committed, but it does not follow that jurisdiction is lost by waiting for a more fitting or convenient time.

"We know of no law or rule requiring the court to suspend a trial for the purpose of passing judgment on a contemner and making the necessary record thereof. Where a defendant is on trial for a grave crime, it might result in serious prejudice to him if his attorney were to be adjudged guilty of contempt and subjected to punishment therefor in the midst of the trial. While the court may punish a direct contempt instanter, yet, if of opinion that imposing punishment at that time would be unwise, or that prejudice to some of the parties before the court might ensue therefrom, it may defer action in the interest of justice and fairness, and does not lose jurisdiction by doing so.

"Of course the power to punish as for a direct contempt must be exercised promptly, if exercised at all; but the time within which it must be exercised is not well defined, and depends in a large degree upon the facts and circumstances of the particular case. In the present case the power was exercised as soon as the jury had retired and before the verdict was returned; and we are clearly of opinion that jurisdiction to exercise it would continue at least until the trial was fully completed. *Ex parte Terry*, 128 U. S. 289. * * *"

The chief defense which appellants make for their obstructive tactics and impudent charges is that the judge

provoked them by making what they consider indefensible rulings in the case. The validity of these rulings is not before us on this appeal. But it must be borne in mind that when counsel differ as to the rulings of a judge, they acquire no privilege to charge him with bad faith and misconduct, and to obstruct the trial. Their only remedy is by an appeal.

The order sentencing the appellant Sacher is affirmed except for Specifications I, XV and XVIII, as to which it is reversed. The orders sentencing appellants Gladstein, Crockett, McCabe, Isserman and Dennis are affirmed except for Specification I, as to which they are reversed.

APPENDIX

CONTEMPT CERTIFICATE

In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below were committed in the actual presence of the Court and were seen or heard by the Court during the trial of the case of *United States of America* v. *Foster, et al.*, C 128-87, which commenced on January 17, 1949.

By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or, in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately en-

speak of a ruling by the Court as done under a pretext, and use such other language as you used there. You must know that you are doing something that you should not do, and I direct you to desist.

Mr. Gladstein: Your Honor, I ask that you consider the law that applies to this question because——

The Court: I heard what you said.

Mr. Gladstein: Do you refuse to have a memorandum of law submitted to you?

The Court: And I consider the language offensive.

Mr. Gladstein: Do you——

The Court: And you know, you know that it is, but of course it may be pleasing to some of the people.

Mr. Gladstein: Well, that is not—I have never said anything——

The Court: But that is an additional reason why you should not do it.

Mr. Gladstein: I have never said anything for the purposes of pleasing anyone here but for the purpose of trying to put in evidence and to persuade your Honor to do what I think the law requires.

The Court: Well, you are not going to provoke me, so you might as well stop doing that.

Mr. Gladstein: I want to make an offer of proof concerning this letter which, according to the witness' statement, is in this building and readily available and which, by the way, Mr. Duncan, it was called for in the subpoena that was served on you—isn't that so?

The Court: I direct you not to make this one. It is already sufficiently evident in the case what the paper is and what your claims about it are, and mere repetition of it will only serve to use up your time that you can employ to better advantage.

Mr. Gladstein: All right. Let the record show that it is a letter written in May, 1942 by Mr. Duncan, the

present witness, and let the record further show that I called for that letter and for the letter or questionnaire in which it was a response, to which it was a response——

The Court: Now, Mr. Gladstein, you have again done what I have told you not to do.

Mr. Gladstein: I want the record to show that I had the subpoena served on this witness. Can it now show that?

The Court: I understand what you want, but the accumulation of these acts of disobedience to my rulings is something that concerns you, and I hope that you won't keep at it any more."

XI.

On the same afternoon, shortly after the foregoing incident, Mr. Gladstein offered in evidence the 1949 edition of "Poor's Register of Directors," consisting of 3200 pages. The Court stated that it would hear Mr. Gladstein on the question of the relevancy of the exhibit. After hearing a statement from Mr. Gladstein, the Court sustained the objection to the book. Thereupon Mr. Gladstein, in a sarcastic and impertinent manner, said (Ch. Tr. 4590):

"I thought when you heard the facts you would, Judge."

XII.

On March 1, 1949, in the course of the cross-examination of the witness John Whittier Darr, Jr., the witness was asked by Government counsel how long he had been a member of American Youth for Democracy. Mr. Gladstein objected to the question as incompetent, irrelevant and

tered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

Accordingly, I adjudge the following guilty of the several criminal contempts described below:

Defendant	*Specifications*
Harry Sachen.	I, II, V, VI, VII, VIII, XII, XIV, XV, XVI, XVII, XVIII, XIX, XXV, XXVII, XXVIII, XXIX, XXX, XXXI, XXXIII, XXXVI, XXXVII, XXXIX.

immaterial. The Court overruled the objection, but Mr. Gladstein continued to argue (Ch. Tr. 4781).

As soon as Mr. Gladstein finished, Mr. Sacher and Mr. Isserman interjected sarcastic comments, as follows (Ch. Tr. 4781):

> "Mr. Sacher: May I respectfully say to your Honor that membership in the American Youth for Democracy has no more bearing on the credibility of this witness than the fact that Judge Knox is director of two of the biggest corporations in this country."
>
> "Mr. Isserman: Or that your Honor is in the Social Register."

The Court again stated that it overruled the objection and directed the witness to answer the question and said to the witness he should bear in mind that he should not make a speech as he had done a moment ago. Thereupon Mr. Gladstein said (Ch. Tr. 4782):

> "Let the record show my objection to the Court's gratuitous and improper characterization of the witness' testimony, as an effort to make a speech——"

XIII.

On April 4, 1949, in the course of the cross-examination of the witness Budenz, the United States Attorney objected to a line of questioning by Mr. Gladstein, who was directed by the Court to turn to something else (Tr. 2296). Mr. Gladstein persisted in arguing the matter with the Court. The Court again directed Mr. Gladstein to turn to another subject and told him that when a lawyer persists in arguing about the same thing the only inference is that the lawyer is trying to leave the impression that the facts re-

Richard Gladstein	I, IV, VIII, X, XI, XII, XIII, XVII, XX, XXIII, XXIV, XVIII, XX, XXIII, XXIV, XXXII, XXXIV, XXXV.
George W. Crockett, Jr.	I, III, VII, XXI, XXII, XXVII, XXIX, XXXVII, XXXVIII.
Louis F. McCabe	I, VI, VII, VIII, IX, XXVII.
Abraham J. Isserman	I, VI, VII, XII, XXVII, XXXI, XXXII.
Eugene Dennis	I, XIX, XXII, XXXI, XL.

I.

During the entire trial, Messrs. Sacher, Goldstein, Crockett, McCabe, and Isserman, attorneys and counsellors-at-law, and after March 17, 1949, Mr. Dennis, attorney *pro se*, joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster, et al.*, C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities.

cited in questions asked by the lawyer and ruled out actually represent the truth. Mr. Gladstein thereupon made the following statement in the presence of the jury (Tr. 2297):

"They do represent the truth and I intend to show that they do. Let me put it this way——".

XIV.

On April 5, 1949, during the cross-examination of the witness Louis F. Budenz, the following transpired (Tr. 2479-2480):

"Q. Can't you say certainly whether it was in August or not?

Mr. McGohey: I object.

The Court: Overruled.

It is puzzling me as to what difference it made as to what date he made the speech but——

Mr. Sacher: When this witness undertakes——

The Court: Please don't argue. I allow the question.

Mr. Sacher: When your Honor makes a provocative remark and your Honor says you don't know what difference it makes——

The Court: I strike out your remark about my making a provocative remark. I did not make a provocative remark and I consider your response insolent. Now you please stop that, I am not in the habit of making provocative remarks. I am trying to do my best to administer justice.

Mr. Sacher: And I am trying to defend my clients.

The Court: I will not have insolence from the bar.

To effect this plan, these defendants in this proceeding, contemptuously and without justification:

a. Disregarded numerous warnings of the Court concerning their wilful delaying tactics, except for ironical references thereto;

b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;

c. Insinuated that there was connivance between the Court and the United States Attorney;

d. Insisted on objecting one after another to rulings of the Court, despite a ruling on the first day of the trial, repeated several times thereafter, that all objections and exceptions would inure to the benefit of each of their clients unless disclaimed;

e. Persisted in making long, repetitious, and unsubstantial arguments, objections, and protests, working in shifts, accompanied by shouting, sneering, and snickering;

f. Urged one another on to badger the Court;

g. Repeatedly made charges against the Court of bias, prejudice, corruption, and partiality;

h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;

i. Disregarded repeatedly and flagrantly the orders of the Court not to argue without permission and to desist from further argument or comment;

j. Disregarded rulings on the admissibility of evidence so as to endeavor to place before the jury by leading questions the subject matter excluded;

Mr. Sacher: I am trying to do my best to defend my clients.

The Court: You please refrain from further comment and frame your next question. I am used to having respect from the bar.

Mr. Sacher: I wish to say to your Honor that I don't want to show you any disrespect.

The Court: You reframe your question.

Mr. Sacher: And you know it.

The Court: Oh, yes, I know it. I sure do.

Mr. Sacher: And I think it is a reciprocal objection. I think lawyers who are defending their clients for their liberty should not be treated as though they were dogs in the courtroom either.

The Court: That is an insolent remark and I strike it out, the statement that you have been treated like a dog. I don't see how you dare speak that way.

If you can control yourself, please ask the next question.

Mr. Sacher: I am trying, your Honor."

XV.

During a session of the court on April 7, 1949, while a Government witness was under direct examination, Government counsel invited the Court's attention to the fact that a Mr. Simon Gerson, who regularly had been seated at defense counsel's table, was circulating certain papers to representatives of the press in the courtroom, whereupon the following colloquy took place (Tr. 2750-2751):

"Mr. Gordon: I see Mr. Gerson passing out some papers to the press section, your Honor.

Mr. Sacher: Now that is absolutely wrong, your Honor. I asked Mr. Gerson to be good enough to speak to someone for me. This is another instance of surveillance.

k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

l. Accused the Court of racial prejudice without any foundation; and

m. Generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the Court which could then be relied upon as a demonstration of the Court's unfitness to preside over the trial.

II.

On January 21, 1949, during the hearing on defendants' challenge to the jury system, Herbert Allen, a member of the petit jury panel for the January Term of Court, was called as the first witness in support of the challenge. During this direct examination by Mr. Gladstein, Mr. Allen was asked for the assessed valuation of his home, to which question an objection was sustained. Thereafter, lengthy argument was directed to the Court by Messrs. Gladstein, McCabe, Isserman and Sacher, which was brought to a conclusion with Mr. Sacher shouting at the Court (Ch. Tr. 1390):

"Well, let me make one thing clear; your Honor said that you were going to conduct a hearing, and I tell you now if what you are going to do is to prevent us from asking these questions and proving the fact, then this hearing is no hearing; *it is just a sham and a pretense designed to prevent the establishment of those facts which will prove that the system is precisely what we say it is.*"

III.

On February 2, 1949, during the challenge to the jury system, Harry Rosten, Research Manager for THE NEW YORK TIMES, was being questioned by Mr. Isserman about Challenge Exhibit No. 20, already in evidence. Objection was made to the line of questioning being conducted by Mr. Isserman, and following argument, the Court sustained the objection. Thereupon, Mr. Gladstein and Mr. Sacher further argued the matter. They were followed by Mr. Crockett, who did not argue but limited himself to the insinuation quoted below (Ch. Tr. 2302):

> "I have only one comment to make, your Honor. I have listened very carefully to the proceedings during the whole time this was going on and what surprises me, frankly, your Honor, is the frequency with which Mr. McGohey will make an objection and the Court will sustain the objection without asking Mr. McGohey to state the reasons for his objection or giving us an opportunity to suggest to the Court the reasons why the objection should be overruled."

On February 3, 1949, during the challenge to the jury system, defense counsel and the Court engaged in a discussion, in the course of which Mr. Gladstein, in an insolent manner, said (Ch. Tr. 2461):

> "Now although everybody, one would think, who did not prejudge the matter here——"

and, after interruption, continued (Ch. Tr. 2463):

> "Mr. Gladstein: Now, before the Court's interruption I was about to point out that what is important here is the question of your Honor's determinations

upon the objections Mr. McGohey has raised, and sometimes even without him suggesting it——

The Court: Yes, maybe I have a right to make a comment from the bench once in a while. It seems probably wrong to you and your colleagues, but it is commonly done, and I have no intention whatever of refraining.

Mr. Gladstein: I wasn't referring to your Honor's comments, because they are always welcome. I was referring to the rulings that you make adverse to the defendants even before the United States Attorney opens his mouth to make an objection. That has happened."

After further colloquy, during which the Court invited a memorandum from Mr. Gladstein in respect to the admissibility of certain proof, Mr. Gladstein continued his reflection on the Court's integrity, as follows (Ch. Tr. 2466-2467):

"Mr. Gladstein: And it is not an easy task to research the authorities and present them to you on the question of the admissibility of this kind of data which is obtained by sampling methods. But if your Honor, *if there is any possibility of having the effect of those authorities respected* and obtaining a reconsideration of the ruling that your Honor has taken, I will certainly do whatever I can to get that memorandum of law to the Court.

The Court: I try to respect all authorities, those that are controlling and those that are persuasive. I try to do my duty as a Judge. I do not think it is very nice of you to put in that little insinuation, but I take it in good part. And so we will pass it.

Mr. Gladstein: Very well. It isn't half of what I felt like saying, your Honor, as a result of what you said.

The Court: Well, I can well believe that."

V.

On the same afternoon, after hearing lengthy argument by Mr. Gladstein (Ch. Tr. 2483-2489), the Court sustained a Government objection to certain evidence proffered through the witness Wilkerson. After a recess granted at Mr. Sacher's request, Mr. Crockett and Mr. Sacher argued for a reconsideration of the ruling (Ch. Tr. 2490-2501). Continuing the attack of defense counsel upon the Court and completely ignoring the fact that the Court had heard Mr. Gladstein at length before ruling, Mr. Sacher loudly complained (Ch. Tr. 2494):

> "I repeat this is an Alice in Wonderland procedure. We always get the sentence first and then the trial. Now, if we would just get back to ordinary procedure with trial first and sentence afterwards, this might be a little bit more real . . ."

The Court directed Mr. Sacher to "completely refrain from further argument along this line" (Ch. Tr. 2494). Notwithstanding the direction of the Court, Mr. Sacher shortly returned to his attack upon the Court, as follows (Ch. Tr. 2500):

> "Is it because the evidence is becoming too devastating for the Government that we must now be circumscribed? This is the telling stuff. Why are we stopped at this point when we proceed definitely to show that the Republican Party vote is the guide to the determination of how many jurors come from a district, and not that impartial selection which the Constitution and the statute require? That is what is at stake in this instance, your Honor, and I submit I don't want

to take any more of your time if we are doing nothing to influence you; I don't want to be like the Yankee in King Arthur's Court * * * "

VI.

On February 4, 1949, during the challenge to the jury system and in the course of the direct examination of the witness Marcantonio by Mr. Isserman, the witness was asked to state how long certain low-rent housing projects had been in existence. The Court sustained an objection and told Mr. Isserman that it did not wish to hear argument from him. However, Mr. Isserman proceeded to argue and he was joined by Messrs. Gladstein, Sacher and McCabe. Repeatedly, the Court interrupted counsel stating that it did not desire to hear argument. Nevertheless, counsel continued (See Ch. Tr. 2544-2548). The Court then directed counsel to proceed with the interrogation of the witness (Ch. Tr. 2548). In the teeth of the direction, Mr. Gladstein continued (Ch. Tr. 2548-2549), as follows:

" * * * since your Honor won't permit me to refer to the authorities, then I refer to a practical suggestion, and that is if instead of consuming time in arguing as to whether or not we have the right to make the simple statement for the record as to what the witness would say if he were permitted to answer the question to which the United States Attorney has objected, and which objection has been sustained—if instead of doing that we were simply allowed to follow the normal, usual routine procedure that takes place even before juries * * * "

Mr. Sacher then commenced speaking and the Court stated that it did not desire to hear him at that time (Ch. Tr. 2549). Despite this, Mr. Sacher continued (Ch. Tr. 2549-2550), as follows:

"But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor is aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congressman Marcantonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial; and I say——

The Court: Did I say that?

Mr. Sacher: Well, you imply that very broadly. If your Honor wishes to deny it I shall be glad to have the denial. But I got the impression very distinctly that your Honor's observation was made just on the threshold of the Congressman's testimony and that it was designed to color the effect and impression to be given to it, and I do not believe, your Honor, that that is appropriate.

The Court: If you are only trying to provoke me; Mr. Sacher, you are wasting your time."

Shortly thereafter, Mr. McCabe concluded with the following statement (Ch. Tr. 2554):

"Yes, but I say that it seems to me that that is what is in your Honor's mind, and that also may very well be addressed to someone outside of this courtroom, and I think that the record, if reviewed by some other authority may indicate unusual degree of tolerance in the face of particularly annoying tactics, which I don't think we are guilty of."

VII.

On the same day, while the witness Marcantonio was still being examined by Mr. Isserman, the witness was asked if he had found many persons residing in his Congression-

al District who were known to him to be of average intelligence. The Court sustained an objection. However, Mr. Isserman proceeded to argue the matter. Finally, the Court sought to close argument, directing Mr. Isserman to take his exception (Ch. Tr. 2621). Nevertheless, Mr. Isserman persisted, (Ch. Tr. 2621-2622), as follows:

"Mr. Isserman: I was in the middle of my objection when your Honor interrupted to misconstrue a statement that I made. I said, conditionally——

The Court: I wish you would not say that I do that, to misconstrue.

Mr. Isserman: It seems to me to have been misconstrued.

The Court: That seems an impertinent thing. Mr. Isserman, that seems an impertinent thing. You are an experienced lawyer and you know better than to do that. Now, you lawyers have been at that here for three weeks, perhaps to provoke me—I don't know what the reason may be. But I do know that if you keep it up some day, perhaps now, perhaps hereafter, there will be a time of reckoning. Now, please don't do that.

Mr. Isserman: And I would like now to object to your Honor's characterization of my comment.

Now, the statement that I was making——

The Court: Well, when you charge me with deliberately misconstruing something I regard that as impertinence.

Mr. Isserman: I did not say it was deliberate, your Honor. But I said it seemed to me to be that. But, in any event, what I was saying was this: I said if this were a small community the method of proof, as indicated by the cases, would be to call the persons directly involved. Your Honor has thus far condition-

ally ruled that your Honor would not allow the calling of those persons who would give the direct evidence on their status."

Mr. Isserman continued his argument and the Court again interrupted to remind Mr. Isserman of the Court's previous direction as follows (Ch. Tr. 2623-2624):

"The Court: Now, Mr. Isserman——

Mr. Isserman: Now, the reason why——

The Court: Let me say something to you. In every judicial proceeding that I am familiar with, and I have had a pretty large experience at the bar, when the Court indicated that it didn't want any more argument on a point the lawyer quietly desisted. If he chose to except he noted his exception and went on to something else. Here, perhaps in an endeavor to wear me out, which it is gradually doing, you keep that up, and you make the argument or arguments just as you are doing now. And I say, as I have said before, that that in my judgment is not the proper conduct of an attorney. It is extremely wearing on the Court in a trial of this kind. I suppose it will wind up by bringing me down. I hope it won't. I may have the strength to go on, and I hope I shall. But I tell you—stop it.

Mr. Isserman: I would like to take exception to your Honor's remark as an improper characterization of my conduct.

I would like to state my—complete my objection for the record if I may.

The Court: You insist on going ahead again, and all I can do, as I do not intend to make a rumpus about it, is to advise you again—please desist; and then, if you insist upon going on, why, you must take the consequences, whatever they may be.

Mr. Isserman: May I state my objection for the record?

The Court: You may not."

Instead of proceeding with the interrogation of the witness, Messrs. McCabe, Sacher and Crockett carried on the argument. The Court told Mr. McCabe that argument was unnecessary (Ch. Tr. 2625), and then Mr. Sacher, angrily shouting, offered his "observation" to the Court (Ch. Tr. 2626-2627). Mr. Crockett thereupon took up the argument and failed to desist until the Court warned him that his insistence on going on was in defiance of the Court's direction (Ch. Tr. 2632).

VIII.

The jury challenge commenced on January 17, 1949. On February 11th the Court determined that counsel for the defendants had taken almost four weeks to put in evidence which could have been adduced in no more than three or four days (Ch. Tr. 3291) and accordingly the Court concluded that defense counsel had engaged in a "deliberate effort here to make a mockery of justice" (Ch. Tr. 3290). At the close of court on that day, the Court directed defense counsel to submit a statement showing what they proposed to prove in the remainder of the challenge and how they proposed to prove it (Ch. Tr. 3344-3345). The statement was submitted on February 14th (Ch. Tr. 3346) and was found insufficient (Ch. Tr. 3415). At this juncture, the Court in the exercise of its discretion as to the order of proof, refused to hear further testimony at that time on behalf of defendants in connection with their challenge to the jury system, and directed that the Government proceed with its proof. Counsel for defendants vociferously objected and, in the course of argument, Mr. Sacher, in an insolent manner, said (Ch. Tr. 3420):

Instead of making their motions, defense counsel lengthily argued for an adjournment. During the argument, the following occurred (Tr. 6046-6048):

"Defendant Dennis: I rise, first of all, your Honor, to protest most vigorously against the outrageous and arbitrary ruling which you have just made.

The Court: Which ruling is that?

Defendant Dennis: The ruling in respect to denying the defense even a reasonable opportunity to present it motions and the grounds for the motions.

The Court: You see, you are not familiar with these legal matters, Mr. Dennis.

Defendant Dennis: I am familiar, your Honor, with a number of things on which I would like to speak very briefly.

The Court: Well, go ahead. This is your time.

Defendant Dennis: I must say, the first thing that must be noted in respect to directing counsel to conclude any arguments or proffer any motions by 4:30 this afternoon makes a mockery of justice, because by this ruling and by the injunction that defense must produce its first witness by tomorrow morning, your Honor has stated, in effect, that irrespective of what motions we offer that you cannot be convinced that there is no prima facie case.

The Court: Let me ask you a question——

Defendant Dennis: And, moreover, that you have prejudged this case.

The Court: Let me ask you a question: Do you conceive it possible that the proof in support of a given charge might be so clear that argument of its legal insufficiency might not be helpful? Does that strike you as possible as a theoretical concept?"

Subsequently the Court asked Mr. Dennis what, in his opinion, was lacking in the proof adduced by the Government necessary to sustain a charge. To this Mr. Dennis replied (Tr. 6050):

> "Your Honor, in respect to that the first thing I would say is that we in the United States should never permit what is being perpetrated here, where you have a federal police interpretation of what we defendants think and believe in."

Thereafter, in the course of his argument, Mr. Dennis made the following comment (Tr. 6053-6054):

> "And it is highly reminiscent in many respects of the Reichstag fire trial and of the efforts of reactionaries in this and other countries to outlaw the Communist Party as a prelude to trying to drag our nation along the path of war and fascism. And however much you may think or agree or disagree with this I would strongly urge as a matter of most elementary justice and not to deprive the defense of some of the remnants of due process of law that we should be afforded an opportunity of a few days at least to prepare our motions, our argumentation."

Following this last statement, Mr. Crockett arose and the following occurred (Tr. 6054):

> "Mr. Crockett: If the Court please——
>
> The Court: Yes, Mr. Crockett.
>
> Mr. Crockett: —I assume perhaps correctly that it would be to no avail to ask the Court to grant a reasonable time to prepare——
>
> The Court: It would be without avail to ask me to give any time for the making of these motions. They are to be made this afternoon.

Mr. Crockett: That is why I made the assumption.

The Court: Well, you put that word 'reasonable' in there. I don't (think) the request for any time now is reasonable. That is why I denied the application.

Mr. Crockett: I think, your Honor, that the defendants, as well as myself, and other counsel began this trial with certain illusions that have been shattered because of the prejudicial actions of the Court."

When the Court suggested that Mr. Crockett should be more temperate, the following occurred (Tr. 6055):

"Mr. Crockett: I suggest that this latest ruling of the Court merely confirms all of the prejudicial rulings that have been made in the course of this trial. I suggest that during the course of this trial it has actually been possible and I have heard spectators making the Court's rulings before the Court himself made the ruling.

The Court: It is very interesting.

Mr. Crockett: Because the Court's bias was so obvious that it was possible——

The Court: That is an insulting comment you are making, Mr. Crockett, a very insulting comment."

XXIII.

On May 24, 1949, during the direct examination of the witness John Gates, which was conducted by Mr. Sacher, the Court sustained an objection made by the United States Attorney to a question asked of the witness, inquiring whether he ever had to pay the fine or serve the sentence imposed in connection with the witness' conviction on a certain charge. The Court cut off an attempted argument by Mr. Sacher in opposition to the ruling with the direction

that it did not desire argument on the matter. Thereupon, Mr. Gladstein interjected a statement which (1) wilfully misstated the evidence by referring to the "conviction" of the witness Nicodemus in the presence of the jury when, in fact, he knew that Nicodemus had been found not guilty and that the Court had so ruled; (2) improperly characterized the Court's correction of the injustice to the witness Nicodemus; and (3) insinuated that the Court was guilty of impropriety and partiality in sustaining the objection. The incident was as follows (Tr. 6271-6272):

> "Mr. Gladstein: May I interrupt, your Honor, to object to the Court's ruling that prevents the establishment by testimony of the ultimate outcome of this matter, and I submit that a strange contrast is afforded by the Court's insistence, for example, to which we have no objection—but the Court's over-insistence on pursuing to its final conclusion the arrest and conviction of the witness Nicodemus, concerning which it would seem to me——
>
> The Court: You will please desist from further argument, Mr. Gladstein.
>
> Mr. Gladstein: Very well."

XXIV.

On May 25, 1949, in the course of the direct examination of the witness John Gates, which was being conducted by Mr. Sacher, an article written by the witness in 1938 was offered in evidence. Objection was made by the United States Attorney, which objection was sustained by the Court. Thereupon the following occurred (Tr. 6460-6462):

> "Mr. Gladstein: Your Honor, may I ask that the Government be required to state the grounds for its objection to a document that this man wrote twelve

years ago before he ever knew that there would be an indictment and when he expressed his political views on the very issues involved in this case? May I know what the legal ground is by which a man is prevented from showing his intentions, his state of mind——

The Court: You remember my instruction about these arguments?

Mr. Gladstein: I desire to ask the Court to require the Government to explode this mystery whereby with the mere words 'I object' they can shut off the right of a man to show——

The Court: You may think that this matter of argument is helpful. It is certainly not helpful to me. Now you have requested, and you could have requested without those comments and that argument that the Government be required to state the grounds of its objection. That application is denied.

Mr. Gladstein: Your Honor, we have been sitting here for months——

The Court: Now please don't start this argument over again.

Mr. Gladstein: May I——

The Court: I have no desire to hear it. If you have some motion, make it. If you have some objection, state it and I will rule on it.

Mr. Gladstein: Well, I do object to a ruling which prevents a man from summoning to his defense the deeds and the acts of his life committed long before there was any question about it——

The Court: I do not really think, Mr. Gladstein, you have any right to proceed with that form of argumentative matter when I have forbidden it. Now you have already got a very substantial record of dis-

obedience here. You may have an additional record now if you choose to go on.

Mr. Gladstein: I have no desire to disobey the Court's admonitions.

The Court: But you have.

Mr. Gladstein: I do have a desire, your Honor, to bring before the jury the opening pages of the book—

The Court: Well, I think, Mr. Gladstein, this sort of argument is the very sort of thing that you are not entitled to bring before the jury and I forbid it.

Now as I said before, if you choose to pile up the record of these things against yourself, you may go on.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: Otherwise you will sit down.

Mr. Gladstein: I take exception to the Court's remarks.

The Court: Very well."

XXV.

On May 26, 1949, in the course of direct examination of the defendant John Gates by Mr. Sacher, objection was made to a question asked of the witness, and was sustained. Mr. Sacher then asked the Court for the theory upon which the objection was sustained. The Court replied that it did not desire argument. Mr. Gladstein arose and asked the Court to inquire of the United States Attorney as to what legal grounds the United States Attorney urged in support of his objection. The Court refused to do this. Mr. Sacher then put another question to the witness, to which objection was made and sustained. Mr. Sacher angrily stated (Tr. 6532):

"I don't think there is a soul in this courtroom who knows what the words 'Past sins must be paid for

The Court: Well, if Mr. Gerson is passing out press releases in the courtroom, please stop it.

Mr. Sacher: Well, there are no press releases.

The Court: All right. Then that settles it, that is the end of it.

Mr. Sacher: But it is uncomfortable, your Honor, to be under observation. Can't we move freely in the courtroom without having our movements remarked upon?

The Court: Well, if you haven't been moving freely in the courtroom, Mr. Sacher, then my eyes and ears have been deceiving me.

(Mr. Gordon hands paper to the Court.)

The Court: Now let us see what this paper is that Mr. Gordon produces.

(After examining). Why, it is a press release—doing just what you said was not being done.

Mr. Sacher: I asked Mr. Gordon—Mr. Gerson to see someone for me on the outside, and it had nothing to do with press releases, your Honor.

The Court: Well, I have in my hand a press release which it appears was just handed out by him and which you deny.

Now I don't want to get into any collateral controversies here and we will just let it rest with this direction: I do not want any press releases handed around here in the courtroom or anything of that kind. Now this isn't a propaganda place here. This is a court of justice where people are in trial and I direct that no more of that be done."

The press release which was retained by the Court bears the pictures of the defendants and was captioned as follows:

"TRIAL OF THE TWELVE

401 Broadway—Room 1601-02-
New York 13, N. Y.—
Walker 5-2010

Public Relations Office
For Release
April 7, 1949"

The records of the Clerk of the Court reflect that on January 17, 1949, Messrs. Sacher, Gladstein, Isserman, Crockett and McCabe notified the Clerk that for all purposes relating to any matter in the trial the address of each is 401 Broadway, Room 1602, New York 13, New York, and that the office telephone number is WAlker 5-2010, the same address and telephone number which appeared on the press release referred to above.

XVI.

On April 19, 1949, in the course of the direct examination of the witness Charles Nicodemus, Mr. Gladstein objected to a question which had not yet been completed, whereupon the following transpired (Tr. 3649-3650):

"The Court: Well, it seems to me, Mr. Gordon, there is something in that. Why don't you ask him a question without covering the matter of the other testimony? Is there something you want to direct his attention to?

Mr. Gordon: Yes, I want to ask him whether he had received any instructions.

Mr. Sacher: I object to this, your Honor, because it is quite obvious——

Mr. Gordon: Why does Mr. Sacher shout me down?

Mr. Sacher: Oh, Mr. Sacher shouting this little boy down.

The Court: Now, Mr. Sacher, you are getting back into your old form.

Mr. Sacher: Your Honor, I have consistently been in this form and no observations from the bench will change that form.

The Court: You never can tell what will happen.

Mr. Sacher: With your Honor up there I suppose that is true.

The Court: I might possibly get control of my courtroom. I think I shall."

XVII.

On April 22, 1949, in the course of the direct examination of the witness Charles Nicodemus, the Court sustained an objection made by Mr. Gladstein to a question asked by Government counsel. Mr. Sacher then arose and asked the Court to admonish Government counsel not to ask questions which were leading. The Court pointed out that the objection had been sustained. Notwithstanding that Mr. Sacher already had stated the ground for his motion, Mr. Sacher then asked the Court whether he could say why he wanted the Court to rebuke Government counsel, but the Court refused permission. Mr. Sacher then remarked in a sarcastic manner (Tr. 3680):

"I see, only Mr. Gordon and Mr. Nicodemus may speak."

XVIII.

On April 22, 1949, during the cross-examination of the witness Charles Nicodemus, Mr. Sacher asked the witness if he had pleaded guilty to an indictment for carrying concealed weapons. The Court, expressly stating that it under-

stood that counsel was bringing out a conviction of crime, permitted him to proceed with the examination on this subject. Mr. Sacher then knew, on the basis of the entries reflected on the certified copies of the judgments in his possession, that the witness had been found not guilty on two separate charges, but he did not disclose those facts to the Court. Instead, he continued the cross-examination on this subject, knowing that the Court was permitting the line of examination on the theory that evidence concerning convictions for crime was being elicited. When Government counsel were permitted to examine the judgments and sought to inform the Court of the fact that the witness had been found not guilty, Mr. Sacher exerted every effort to prevent the disclosure of these facts to the Court (Tr. 3716-3723).

In the course of redirect examination of the witness the Court reiterated that the judgments disclosed that the witness had been found not guilty (Tr. 3765-3768), whereupon the following occurred (Tr. 3767):

"Mr. Gladstein: And also, in connection with your Honor's statements that you will continue to tell the jury that the case in which Mr. Nicodemus was involved turned out as not guilty, would you be good enough to add, if you tell the jury that, that it was no doubt because Mr. Nicodemus was innocent that the Court imposed a sentence of $140?

The Court: You see, Mr. Gladstein, it is the first experience I have ever had either at the bar or at the bench where counsel were so brazen, where again and again they argued over the Judge's shoulder to the jury in what seems to be a deliberate attempt to induce the jury or some member thereof to disregard the Court's instructions. I have heretofore had occasion to tell counsel that that is treading on dangerous ground, and I hope it will not be repeated."

XIX.

On April 25, 1949, in the course of the cross-examination of the witness Garfield Herron by Mr. Gladstein, he offered a book in evidence, to which objection was made by the Government. After argument, the Court ruled that it would not admit the entire book, but, if there were some portion of it that was relevant, the Court would allow that portion in evidence (Tr. 3928-3932). At this point Mr. Sacher arose and argued that it was necessary to have the book in its entirety in evidence, and he continued the argument until the Court directed him to desist (Tr. 3936). Immediately, Mr. Dennis arose and the Court stated to him that it did not desire any further argument, saying that further talk would not be for the purpose of persuading the Court in connection with his ruling, but for other purposes (Tr. 3937). Mr. Sacher thereupon arose and objected to the statement. The Court interrupted him, saying that he was not going to have the trial carried on for propaganda purposes. Mr. Sacher thereupon stated (Tr. 3937):

> "I object to that. That is what the prosecution is doing. We are trying to prove the truth here and we are being stopped from proving the truth. That is what is happening."

Following this, Mr. Dennis arose and stated he would like to make a brief observation. The Court again stated that it did not desire to hear further argument (Tr. 3937-3938). Nevertheless, Mr. Dennis commenced to make a statement. The Court interrupted, asking Mr. Dennis if he realized the Court had directed counsel not to argue (Tr. 3938). Despite this, Mr. Dennis continued, and the following occurred (Tr. 3938-3940):

> "Defendant Dennis: I would like to make one brief observation, your Honor, because this is not a small

question. I would like to remind the Court that we eleven defendants are not charged——

The Court: You realize I told you not to do this, don't you?

Mr. Dennis: I understood I might make a brief observation.

The Court: But you want to go on just the same. Now I don't think you are helping yourself by doing that, but that is your lookout.

Defendant Dennis: I would, briefly, like to place the following cardinal question. We eleven defendants are not charged, as your Honor intimated, charged with conspiring directly or indirectly with attempting to or take any steps to overthrow our Government by force and violence. We are charged with an alleged conspiracy to organize the Communist Party, which the prosecution claims would advocate and teach the necessity and the duty to overthrow the U. S. Government by force and violence, and that is to say we are charged with exercising our inalienable rights of free speech, free press and free assemblage, and——

The Court: I suppose you are just daring me to do something to you now but I am not going to do it.

You gentlemen may be just as disorderly, just as disobedient, just as disrespectful as you choose to be, and you will not goad me into doing something which may prove only a source of difficulty in the trial.

Now I tell you again to stop."

Following the statement of the Court, Mr. Crockett arose and made an objection, and Mr. Dennis, who had remained on his feet, continued his statement, saying (Tr. 3840):

"And the final remark, your Honor, is that we defendants intend, as we are duty bound to do, to show really what we have advocated, what——"

At this point the Court found it necessary to take an adjournment for five minutes to prevent Mr. Dennis from continuing to flout its direction.

XX.

On May 2, 1949, in the course of the cross-examination of the witness Angela Calomiris, the following transpired (Tr. 4471-4472):

"Q. Now you have said that in the 1947 course the first one of the subjects on which you studied at that course was capitalism and the class struggle, involving the nature of capitalism.

Mr. Wallace: Objection.

The Court: Sustained.

Mr. Gladstein: That is preliminary to a question. I haven't asked a question yet, your Honor.

The Court: All right.

Mr. Gladstein: It gets so that even before I ask a question it is sustained, the objection to it.

The Court: Now that I consider a distinct impertinence——

Mr. Gladstein: I did not ask a question.

The Court: —and just an accumulation of what you have been doing here. You say it gets so that the Court rules before you have asked a question, you intimate that I am so prejudiced here that I don't want to be fair and am not fair. Now you will please stop that. You are not helping yourself or your clients by doing it, I think."

XXI.

On May 4, 1949, in the course of the direct examination of the witness Thomas Younglove, the Government offered

an educational outline in evidence. This was near the close of the day's session and Mr. Sacher requested a recess to afford defense counsel an opportunity to examine the exhibit. The Court asked if it would not be practical to go to some other subject, or if there were not some books which the witness would be called upon to identify. When Government counsel replied that he could not proceed to another subject, but that there were books that were to be identified, Mr. Sacher observed that if the validity of the introduction of any of the books depended upon the introduction of the proffered exhibit he would feel bound to raise an objection.

The Court then stated that if certain books were to be identified it could see no harm that could come to the defense. Thereupon Mr. Crockett arose and objected to the Court's anticipation of the nature of additional proof that the Government might offer. Although the books mentioned by the Court were "Foundations of Leninism" and the "History of the Communist Party of the Soviet Union," both of which had been previously admitted into evidence and identified by numerous witnesses, he suggested that the Court was improperly familiar with the Government's evidence before it was adduced, as follows (Tr. 4826):

> "I don't think it is customary for the Court to show such familiarity with the possible course—with proof that the Government might present. That is the gist of it."

XXII.

On May 19, 1949, shortly after the luncheon recess, the Government rested its case and the Court set aside the balance of the day for the hearing of any motions the defense desired to make.

now' means unless this witness is permitted to say what he was talking about.

The Court: Now——

Mr. Sacher: And what is the use of laying it before the jury?

The Court: —you realize that your action now is deliberately contemptuous?

Mr. Sacher: It is not deliberately contemptuous. I am just bewildered, your Honor.

The Court: I have told you not to argue these matters and I really am quite at a loss to understand why you flagrantly and deliberately and persistently disobey my instruction. Probably it is because I don't shout at you, but I don't like to do that."

XXVI.

On June 2, 1949, in the course of the direct examination of the witness John Gates, which was being conducted by Mr. Sacher, a pamphlet written by William Z. Foster was offered in evidence and objection by the United States Attorney was sustained by the Court. Thereupon, Mr. Gladstein moved that the Court strike out testimony of all Government witnesses dealing with the claim that the Communist Party or its members taught and advocated that force and violence should be used in the event that the United States became involved in a war. This motion was denied by the Court, but Mr. Gladstein continued his argument. The following then occurred (Tr. 6838):

"The Court: You know, Mr. Gladstein, that I have indicated my desire not to hear arguments unless I desire them.

Mr. Gladstein: I do, your Honor, but I thought that that was limited simply to hearing argument.

Now it seems to me, and I submit, that the Court is now making it plain that it no longer wishes to hear evidence from the defendants, and that began to be true when the defense began to put in its case."

XXVII:

On June 3, 1949, in the course of the cross-examination of the defendant John Gates, he refused to answer a question after being directed to do so by the Court, and he was sentenced for contempt. Immediately upon the pronouncement of the judgment for contempt, Messrs. Gladstein, Sacher, Crockett, Isserman and McCabe, and the remaining ten defendants, simultaneously arose in the courtroom. The defendant Henry Winston and the defendant Gus Hall, each taking several steps past the end of the counsel table and toward the bench, began in a disorderly and threatening manner, to shout at the Court in loud, angry voices. They were adjudged guilty of contempt for their misconduct.

The situation at that time became so serious that it was necessary to send for additional Deputies Marshal, who were then in other courtrooms in the building, to assist in restoring order and to prevent any further incidents in the courtroom.

The Court suggested to Mr. Gladstein that it would be "prudent if the defendants resumed their seats." Mr. Gladstein rejected the Court's request, saying (Tr. 6975), "Well, your Honor, may I first have a ruling on the right of the witness to complete the record of his invocation of his rights under the Fifth Amendment," and continuing to argue thereafter. Mr. Gladstein did not instruct his clients or any of their co-defendants to take their seats, and the defendants gave no heed to the Court's direction. Messrs. Sacher and Isserman also made statements to

the Court, but neither of them made any attempt to assist the Court in restoring order in the courtroom, nor did Messrs. Crockett and McCabe. After the defendant Dennis had made statements to the Court, he turned to his co-defendants and stated that he urged "upon my co-defendants that they at this time do not speak—they can act as they see fit. I urge them not to call for any provocation" (Tr. 6977). Only then did the ten co-defendants resume their seats in the courtroom and order was restored.

XXVIII.

On June 7, 1949, Mr. Sacher objected to a question asked by the United States Attorney during the cross-examination of the defendant John Gates. Despite the fact that the Court had frequently in the past directed counsel not to argue without leave, Mr. Sacher commenced arguing, saying (Tr. 7123):

> "I should like to observe that the defendant is being tried——"

The Court interrupted him with the suggestion that he desist. Nevertheless, Mr. Sacher in a loud voice commenced to shout (Tr. 7123):

> "Well, your Honor, I submit that——"

When the Court directed Mr. Sacher to stop shouting, Mr. Sacher said (Tr. 7123):

> "I am not shouting and I resent the filling of the record with statements about my shouting when all I am doing is speaking vigorously, and that, I think, is part of the function of an advocate."

The Court commented that Mr. Sacher was one of the most vigorous speakers it had ever heard. Mr. Sacher continued to argue, saying (Tr. 7123-7124):

> "That may be, but I say to your Honor that I resent this trying the defendant for things that came 15 years or 18 years ago and I submit that what he is being tried for is what is charged in the indictment between the years April 1, 1945 and July 20, 1948, and I also wish to say to your Honor that I don't think——"

He finally subsided, but only when the Court advised him that he was proceeding in direct and wilful disobedience of the direction of the Court.

XXIX.

On June 9, 1949, the defendant John Gates was asked on cross-examination whether he had ever been convicted of a crime. He commenced to shout, saying (Tr. 7363):

> "I am not making a long explanation. Let me answer. I did testify on direct examination—why don't you read the transcript? This is repetitious. I testified on the direct examination as to what I was convicted of, and Mr. McGohey knows it very well——"

The United States Attorney then requested that the record show that the witness had been shouting when he made the last answer. Thereupon Mr. Sacher stated (Tr. 7364):

> "May the record show that the witness is being crucified unnecessarily with interrogations to which he has truthfully answered already."

When the Court directed that this remark of Mr. Sacher be stricken, Mr. Crockett arose and, in the presence of the jury, said (Tr. 7364):

> "May the record show that this is the fifth day of the witness' imprisonment in jail."

The Court remarked that it would not be provoked into an answer the Court might later regret. Mr. Sacher then stated (Tr. 7364):

> "I object to that. We are the ones who are being injured and we are not being permitted to complain of the injury that is being inflicted on us. I think in the present state of the record, your Honor, it ill becomes anybody here to claim any martyrdom."

XXX.

On June 30, 1949, in the course of the cross-examination of the defendant Gilbert Green by the United States Attorney, he was interrogated concerning a series of false statements in an application which he had prepared. When pressed for an answer concerning one of the false statements, the witness became evasive. An objection by Mr. Isserman was overruled. Mr. Sacher, who did not represent the witness and who was not participating in the examination of him, arose and interjected, as an attempted diversion (Tr. 8895):

> "I would like to quote the Court and say 'This is pretty small pickings'."

XXXI.

On August 1, 1949, the witness Yolanda Hall, called by the defense, was asked a question on cross-examination and then the following transpired (Tr. 11,031):

"Mr. Isserman: I object to that as argumentative. It is not based on the facts in evidence as testified by this witness.

The Court: Mr. Isserman, do you remember my admonition, that when counsel objects, counsel is merely to state 'I object'? You have violated it several times this morning. Did you forget?

Mr. Isserman: I am reminded of it now. It is a habit that goes back over 25 years. It is hard to give up that habit, which your Honor has undoubtedly engaged in yourself.

The Court: Every time you do that your action is contemptuous and direct, I think, wilful and deliberate disobedience of my command.

Mr. Isserman: I must object to your Honor's characterization of my conduct.

The Court: I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous.

Mr. Isserman: I must object to your Honor's finding.

The Court: Very well."

Not much later, during the cross-examination of the same witness, at the same session of the court, she refused to answer a question (Tr. 11,070). At this juncture the following occurred (Tr. 11,071-11,073):

"The Court: Do you remember the oath you took when you were sworn as a witness?

Mr. Isserman: I object to that question.

The Witness: Yes.

The Court: Overruled.

Q. Now, before you——

Mr. Gladstein: May I object to the Court's—the inference from the Court's statement?

The Court: Your objection is noted. It is overruled.

Mr. Gladstein: Because the Court's statement has nothing to do with that.

The Court: I will hear no argument.

Mr. Gladstein: I want to note my objection on the record.

The Court: You have noted it. Sit down.

Mr. Gladstein: I object to that and ask your Honor to admonish the jury——

The Court: Will you sit down or must I call an officer to put you down? I will have no more interruptions on cross-examination. Your field day is over.

Mr. Gladstein: I resent your Honor's remarks as——

The Court: Mr. Marshal, will you please—all right, I see you sat down by yourself.

Mr. Isserman: May I object to your Honor's remarks and ask for a mistrial on the basis of your Honor's remarks?

The Court: Denied.

Defendant Dennis: Your Honor——

The Court: I want no argument, Mr. Dennis.

Defendant Dennis: May I make an inquiry of the Court?

The Court: You may.

Defendant Dennis: I would like to know whether the ruling and remarks of the Court are directed to the defendants and counsel as to prejudice our case before the jury?

The Court: They are not. I have heard enough from Mr. Gladstein. I have heard enough interruptions and suggestions to witnesses and so on, and I will have no more interruptions of cross-examination. Now, that is final and that is over for this trial.

Mr. Sacher: I wish to object to your Honor's remarks as being wholly improper and unjustified and designed to prejudice the jury against the defendants.

The Court: Your motion is denied.

Defendant Dennis: I just wish to state and very emphatically, your Honor, that for all intents and purposes the defendants are deprived of counsel and deprived of what is set forth in the Sixth Amendment to the Constitution."

XXXII.

On August 3, 1949, during the direct examination of the witness Geraldyne Lightfoot by Isserman, she was asked a question to which the Government objected. The Court undertook to elicit the information sought by a direct question. In order to forestall an answer, Messrs. Isserman and Gladstein provoked a disorderly disturbance and succeeded in preventing an answer to the question, as follows (Tr. 11,269-11,274):

"The Court: Mrs. Lightfoot, in this matter of the strategy of the workers, did you discuss the dictatorship of the proletariat, imperialism, and just and unjust wars, and things of that kind, or were they not mentioned?

Mr. Isserman: I object to the question.

The Court: Overruled.

The Witness: Under topic A—under topic C——

The Court: You will answer that question yes or no or state that you cannot answer it.

Mr. Gladstein: I object to the Court's tone and manner of badgering the witness.

The Court: There is nothing about my tone, and you will please sit down.

Mr. Gladstein: I desire to make an objection.

The Court: Mr. Marshal, will you just——

(To the reporter) Read the question to the witness.

We will have no more monkey business here.

Mr. Gladstein: I object to the ruling.

Mr. Isserman: I object to the Court's remark.

The Court: You will sit down, Mr. Gladstein.

Mr. Isserman: And I want to register an objection to the Court's ruling.

The Court: Very well.

Mr. Isserman: As prejudicial to the conduct of the case and to the defense and making the defense impossible.

The Court: When I desire to ask a question, I am going to ask it. I am through with the interference of counsel.

Now go ahead and read the question, Mr. Reporter.

Mr. Isserman: May I ask the Court a question?

The Court: You may not.

(Question read.)

Mr. Isserman: I object to that question.

The Court: Overruled.

A. Under C I discussed——

The Court: Mrs. Lightfoot, did you hear me tell you to answer that question, either that you did discuss those subjects or that you did not discuss those subjects? Now, which was it? You did discuss them or you did not discuss them?

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Gladstein: Your Honor——

The Court: Overruled. I don't want to hear anything from you, Mr. Gladstein.

The Witness: The way that the question was—I heard the question. It says——

The Court: Then you will answer it the way I tell you to, Mrs. Lightfoot. Now, did you discuss those subjects or did you not?

The Witness: The question includes 'things of that kind,' and——

The Court: Then I will take out 'things of that kind.'

Did you——

The Witness: May I hear the question?

The Court: I will give it over again.

Did you in that lecture discuss, when treating the subject of the Strategy of the Workers, the Dictatorship of the Proletariat, Imperialism, Just and Unjust Wars, or any of them?

The Witness: Well, were they mentioned during the course of that discussion, is that what you are asking me?

The Court: Well, I suppose that word 'discuss' has some peculiar meaning in the Communist Party—

Mr. Isserman: I object to that characterization.

The Court: I will reform my question.

Did you mention to the class in that lecture the subject of the dictatorship of the proletariat?

The Witness: I didn't mention it at that lecture—

Mr. Isserman: Just a minute. First of all I wish to object to your Honor's question——

The Court: Mr. Isserman, I am not going to have any interference here. Now you will just go over there and sit down and then you can say what you want to say afterwards.

Now, Mr. Marshal, just escort Mr. Isserman over to the seat.

Mr. Isserman: I would like to make an objection to your Honor's question. Am I allowed to do it?

The Court: You have made it. Go back and sit down there.

(The marshal escorts Mr. Isserman to the seat.)

(Mr. Isserman rises.)

Mr. Isserman: Well, I rise now to object to your Honor's question.

The Court: Overruled.

(Mr. Isserman is seated.)

The Court: Now, Mrs. Lightfoot, you will give me a direct and responsive answer to that question. In that lecture did you discuss the subject—did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Marshal, will you show Mr. Isserman to his seat?

Mr. Isserman: May I not stand at this point?

The Court: You will sit right down. I have had enough contemptuous conduct from you and I am not going to have any more.

Mr. Isserman: I am not aware of any contemptuous conduct.

The Court: Well, you will be aware, all right.

Mr. Isserman: I would like to object to your Honor's remark and I move for a mistrial because your Honor has made the defense impossible.

The Court: Mr. Marshal, get busy.

(Mr. Isserman sits down.)

The Court (to witness): Now answer that question.

Mr. Isserman: I object to that.

The Court: Overruled.

The Witness: The question—may I hear the question again now; after so much I do not remember it.

The Court: The reporter will read it—or I will ask you again:

In that lecture did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

A. In the beginning of that——

The Court: All right, I sustain the objection to that question. We will have no more of it.

Go ahead with your next question, Mr. Isserman."

Having successfully prevented the Court from getting an answer, Mr. Gladstein nevertheless then attacked the Court, as follows (Tr. 11,275-11,276):

"Mr. Gladstein: And that includes the badgering tone and the bullying and blustering tone towards the witness.

The Court: Oh, there is nothing about my tone that is at all noisy or loud.

Mr. Gladstein: No witness can retain composure and dignity under the attack which your Honor has just levied during the last half hour. I assign it as misconduct.

The Court: I consider what you said as absolutely contemptuous, Mr. Gladstein. Now you can keep it up all you want but you do it against my orders.

(Mr. McGohey rises.)

The Court: Yes, Mr. McGohey; do you desire to say something?

Mr. McGohey: I desire to say that certainly your Honor's tone was not loud; there was nothing that I observed in the nature of badgering, and I suggest that now we be allowed to go on with the trial.

The Court: Yes.

Mr. Isserman: And I object to Mr. McGohey's remarks as not being in accord with the facts.

Mr. Gladstein: I would like to say that they are directly contrary to the facts, and I am willing, if your Honor will permit, to have a poll taken of the members of the jury and the people of the press and the people in attendance in this courtroom at this moment as to——

The Court: Mr. Gladstein, you know earlier in this trial I found that no matter how much leeway I gave counsel they just tried to put the whole administration of justice into disrepute by just the sort of conduct that you are now indulging in, and I tell

you now in the most emphatic way that I know without raising my voice, that you are to desist from that. It is wholly improper, as you must know, to talk about having the people in the courtroom polled and having the jury polled as to whether a statement made by somebody is accurate or not. That is all right perhaps in some place but it is not right or proper in a courtroom, and you must know that, so please let the matter go on."

Order had scarcely been restored, when the Court sought to elicit certain information from the witness, which was called for by a question asked by Mr. Isserman. Again Messrs. Isserman and Gladstein successfully prevented the Court from obtaining an answer, as follows (Tr. 11,281-11,284):

"Q. At whose instance did you give that course? A. That was a course given——

The Court: Why don't you just give the person's name. Who was it that told you to give that course?

Mr. Gladstein: Well, your Honor, I object to that. It may not have been a person.

The Court: Overruled.

Mr. Gladstein: I don't think you should direct the witness that way.

The Court: Read the question to the witness, please, Mr. Reporter, and see if we can stop this circumlocution.

(Question read.)

A. This course was given——

The Court: Now, Mrs. Lightfoot, you are going to say at whose instance it was. That means giving the name.

Mr. Isserman: I want to object to that question.

Mr. Gladstein: I want to object to the Court making a direction to this witness and pointing his finger at the witness in an intimidating way. I assign that as misconduct, your Honor.

The Court: Mr. Gladstein, you are perfectly wonderful the way you make these things up.

Mr. Gladstein: I beg your pardon?

The Court: Oh, you go ahead now.

Mr. Gladstein: Does your Honor deny that you——

Mr. McGohey: Oh, if the Court please, can't we get on with the trial and stop this nonsense?

The Court: I raised my finger, and the rest of it is sheer imagination but done deliberately. I know what you are up to, Mr. Gladstein. You and your colleagues here are trying, and again and again have made positively false statements in the record for the purpose of making me appear to be biased and prejudiced and to do the wrong things, that I am not doing. However, I am not going to sit silently by and have you do that.

Mr. Gladstein: I deny that part of your Honor's statement which charges me with making false statements.

The Court: I happen to be in charge of this case and I happen to be in charge of this court.

Mr. Gladstein: I know, your Honor, but I wish the record to show that I deny that part of your Honor's statement that charges me or my colleagues with any false statements, and I not only agree with

but affirm that part of your Honor's statement which is to the effect that your Honor is biased and prejudiced.

The Court: Did I say that? I say you said so very often, and at your table things seem to be unanimous on that subject. You have attacked me again and again and I suppose you will continue to do it.

Now, go ahead, Mr. Isserman.

Mr. Isserman: I join in Mr. Gladstein's denial and object to your Honor's remarks.

The Court: Yes.

Do you desire me to have the rest of the counsel give their views, too, Mr. Isserman?

Defendant Dennis: Your Honor——

The Court: You may add your bit, Mr. Dennis.

Defendant Dennis: No. I arise to make a motion for a mistrial first on the basis of the hostile and belligerent and disrespectful attitude of the Court to this witness, which interferes with the testimony and the presentation of our case.

The second part of my motion is in connection with the ruling of the Court which deprives all counsel frequently not only of stating the grounds of their objection, but even to rise to move an objection.

And, thirdly, I must say that the motion for a mistrial should be granted because you have placed counsel and the defendants under surveillance of this Court, and the case is actually proceeding now in that way and proceeding by a marshal—in a martial atmosphere.

The Court: Your motion is denied, Mr. Dennis.

Defendant Dennis: For those and other reasons I move for a mistrial.

The Court: The motion is denied.
Go ahead, Mr. Isserman."

XXXIII.

On August 5, 1949, shortly after the cross-examination of the witness Robert Manewitz by the United States Attorney began, he was asked when he had resumed activity in the Young Communist League. Thereupon, the following occurred (Tr. 11,577-11,578):

"Mr. Sacher: I object to this line of questioning.
The Court: Overruled.
Mr. Sacher: I was kept from——
The Court: I will have no interruption of the cross-examination; that is over.
Mr. Sacher: Even if it is justified?
The Court: I do not desire argument from you, Mr. Sacher—nor impertinence either."

XXXIV.

On August 10, 1949, in the course of the direct examination of the defendant Robert Thompson, the Court sustained an objection to a question asking the witness to define Marxism-Leninism. Mr. Gladstein then proceeded to argue against the Court's ruling despite the Court's direction that there should be no argument, as follows (Tr. 11,818-11,819):

"Mr. Gladstein: May I call your Honor's attention to the state of the record——
The Court: No, I don't want to hear any argument about it.
Mr. Gladstein: But, your Honor——

The Court: I will hear what this witness directed to be taught, resolutions that he voted for setting up the schools and what was to be taught in the schools, and when the time comes, if it does, for him to testify what he taught and in particular schools, within certain limitations I will permit. I do not conceive the question before us to be one which makes that question relevant.

Mr. Gladstein: Would your Honor notice that in the record your Honor permitted the witness Budenz to be asked precisely that question and to give an answer to it?

The Court: You know I just told you I didn't desire to hear argument but you wanted to get that point in and so again you have become contemptuous. Go ahead.

Mr. Gladstein: May I ask the witness the very same question that Mr. McGohey asked, your Honor?

The Court: I tell you, Mr. Gladstein, again, I do not desire to hear argument.

Mr. Gladstein: I do not want to argue but I am asking permission——

The Court: No, you are arguing, and you are again contemptuous."

XXXV.

On August 26, 1949, during the direct examination of the witness Edward Strong, called by the defense, an objection was sustained to a question asked of the witness by Mr. Gladstein. The Court stated that it wanted no argument, and Mr. Gladstein then commented upon the ruling of the Court, in a private aside to the jury, as follows (Tr. 13,169):

"The Court: It is all right. I don't want argument, Mr. Gladstein.

Mr. Gladstein: That is no——

Mr. McGohey: What was that?

Mr. Gladstein: I was talking to myself.

Mr. McGohey: Were you talking to yourself or part of the jury?

The Court: I did not hear what was said.

Mr. McGohey: I heard.

Mr. Gladstein: I am willing to say what I said.

Mr. McGohey: Say it.

The Court: What did you say?

Mr. Gladstein: Your Honor is asking me and I am replying because your Honor asked, and not because Mr. McGohey directed.

Your Honor said you did not want any argument, and I said under my breath, 'Well, that is no secret.'

The Court: I think that is an extremely improper thing for you to do, and to do as you are leaning right on the rail of the jury box there, and I admonish you not to do that again."

XXXVI.

On August 29, 1949, during the direct examination of the defense witness Max Weiss, Mr. Isserman sought to elicit testimony concerning the disaffiliation by the Communist Party from the Communist International. When the Government objected, the Court heard argument by Mr. Isserman and by the United States Attorney and then overruled the Government's objection (Tr. 13,334-13,337). After some testimony on the subject, the Court sustained an objection to a question concerning a statement at a convention, and Mr. Sacher interjected himself and im-

plied a partiality in the Court's rulings in permitting argument.

In doing so, he again persisted in arguing despite the Court's express statement that it would not hear him (Tr. 13,338):

"Q. Either at the National Committee meeting which you attended in 1940 or the convention you attended in 1940, was there any statement made by anyone that the decision to disaffiliate was one that was a Comintern decision?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: May I be heard on that, your Honor?

The Court: No.

Mr. Sacher: In view of the fact that Mr. McGohey——

The Court: I will not hear you.

Mr. Sacher: But Mr. McGohey was permitted to make a statement concerning this.

The Court: Mr. McGohey responded to a question from me and further asked leave to address the Court which I permitted. I do not desire to hear yor

Mr. Sacher: I have asked your Honor for leave.

The Court: Please be silent, Mr. Sacher. Again you are deliberately contemptuous.

Mr. Sacher: I am asking an opportunity to reply to Mr. McGohey.

The Court: Go ahead, Mr. Isserman."

XXXVII.

On September 9, 1949, during the direct examination of the defendant Carl Winter, Mr. Crockett asked him a

question concerning the Black Legion, to which objection was made. The Court sustained the objection and at the same time stated that it did not want argument. Nevertheless, the following occurred (Tr. 13,893-13,894):

"Mr. Crockett: May I point out——

The Court: I don't want further argument.

Mr. Crockett: I wanted to say——

The Court: I think you are in contempt now. Don't do it. I will not have any more. The time for that is over.

Mr. Sacher: I wish to object to your Honor's characterization of Mr. Crockett's conduct as contempt.

The Court: You may object. You have done enough of it yourself.

Mr. Sacher: I wish to object to that characterization. I think the record will prove, I think your Honor has sought to prejudice this jury sufficiently against counsel.

The Court: You are deliberately contemptuous again.

Mr. Sacher: I am not. I wish to defend the rights of my clients and the right to advocate their cause, and I resent the constant obstruction of that effort on the part of the Court.

The Court: There has been no obstruction of effort, but I will have order by the attorneys here, and I will enforce it with every power at my disposal.

Mr. Crockett: May I ask if the Court is suggesting there has been any disorder by the attorneys?

The Court: You insisted upon continuing arguing only a moment ago and I told you to stop.

Mr. Crockett: I was not arguing.

The Court: That is what you now say but every time you said it you kept it up. Let us stop now and go on with the questions."

XXXVIII.

On September 14, 1949, in the course of the cross-examination of the defendant Carl Winter, the Government offered a certified photostatic copy of a birth certificate in evidence, to which Mr. Crockett objected. The Court granted leave to him to state the grounds of his objection. However, in place of stating legal grounds for his objection, he argued, as follows (Tr. 14,219-14,220):

> "Mr. Crockett: First, I submit that there is an invasion of the family relationship. This refers to a situation which has no relation whatever, and certainly should not be submitted in this court. Certainly I think it is apparent from the exhibit itself that my client's signature appears nowhere on it. There is nothing on that or the original, and I submit that it is taking unfair advantage of a man to show him what——
>
> The Court: Are you making a legal argument or a speech that we have had here so often?
>
> Mr. Crockett: Under the circumstances I decline to state any further grounds. There is no point in talking to a Court, when I would like to state the grounds, when it is apparent that his Honor's mind is closed to any grounds that I might state."

Thereupon the Court ruled that only a portion of the exhibit was relevant and said (Tr. 14,222):

> "I shall receive the name and the address, and so that there may be no misunderstanding about them I shall read into the record, rather than permitting the exhibit to be handed around to the jury, the following:

"'Father of the child, full name, Carl Winter, Color or race, Caucasian. Age at time of this birth, 35. Length of residence in California, zero years, three months, zero days. Birth place, Pennsylvania. Usual occupation lecturer. Industry or business: self.'"

At this point Mr. Sacher said (Tr. 14,222-14,223):

"Mr. Sacher: May I call your Honor's attention to the fact that you indicated there were just three items, and that Mr. McGohey limited it to three items? You have read about six now.

The Witness: May I say, your Honor——

Mr. Sacher: Just the name and address, as I recall it.

The Witness: May I address the Court?

Mr. Sacher: Name, address, and date.

Mr. Crockett: If the Court please——

The Court: Is this additional part that I read very objectionable to you?"

At this juncture, Mr. Crockett made a statement which, by its sarcastic emphasis on the word "seemingly," accused the Court of intentionally reading more of the exhibit than should have been read, as follows (Tr. 14,223):

"Mr. Crockett: If the Court please, in view of your Honor's seemingly unintentional reading more than——

The Court: Mr. Crockett, that is one of the most contemptuous things that has occurred at this trial.

Mr. Crockett: I am trying——

The Court: And for that you will be brought to justice.

Mr. Crockett: I am trying to say, with the Court's permission——

The Court: You just bear that in mind, Mr. Crockett.

Mr. Crockett: Your Honor, may I——

The Court: You say I seemingly do something and accuse me of deliberately evil motives here. That is something that I cannot pass over and I shall not. I now adjudge you in contempt for that."

XXXIX.

At the same session of the Court, the following occurred during the cross-examination of the defendant Carl Winter concerning his use of an alias (Tr. 14,240-14241):

"Q. Now I show you what purports to be the Los Angeles Extended Area Telephone Directory of March 1943, issued by the Southern California Telephone Company and I direct your attention to page 202——

Mr. Sacher: Just a moment. I object to that question.

The Court: Overruled.

Mr. Sacher: I would like to be heard if I may.

The Court: I don't desire to hear you, Mr. Sacher.

Mr. Sacher: Will there come a day, your Honor, when you will hear us?"

XL.

On October 4, 1949, the day after the Court had filed an opinion denying the request of the defendant Benjamin J. Davis, Jr., to discharge Mr. Sacher as his counsel

lengthy argument was made by Mr. Davis, Mr. Sacher, Mr. Isserman, Mr. McCabe, Mr. Crockett, Mr. Gladstein, and Mr. Dennis, that the Court reconsider its ruling. Immediately following the statement that the Court adhered to its ruling, Mr. Dennis moved for a mistrial. In stating the grounds Mr. Dennis, without any foundation, accused the Court of racial bias, saying (Tr. 15,293-15,294):

> "In the light of the fact that the Court has recognized my inalienable constitutional rights and granted me, a white Communist, a defendant, who is not a lawyer, the right to conduct my own defense, its denial of this right to Mr. Davis, a Negro Communist, a defendant who happens to be a lawyer, can only be construed as an act of gross discrimination and an affront to the Negro people."

Dated: October 14, 1949.

HAROLD R. MEDINA,
U. S. D. J.

FRANK, *Circuit Judge*, concurring (except as to Specification I)*:

1. "Friends of the court" have filed with us a large number of briefs which eloquently recall how, in the past, courageous lawyers have importantly contributed to liberty and democracy by defending unpopular clients, despite the browbeating of tyrannical, domineering, trial judges. In those briefs, fear is expressed that, if we affirm any of the contempt orders in this case, lawyers for labor unions or for minority groups or for unpopular persons will, in the future, be intimidated or throttled.

The eloquence is misplaced. The fears are unfounded. We affirm the orders punishing these lawyers not because they courageously defended their clients, or because those clients were Communists, but only because of the lawyers' outrageous conduct—conduct of a kind which no lawyer owes his client, which cannot ever be justified, and which was never employed by those advocates, for minorities or for the unpopular, whose courage has made lawyerdom proud. The acts of the lawyers for the defendants in this trial can make no sensible man proud.

What they did was like assaulting the pilot of an aeroplane in flight, or turning out the lights during a surgical operation. To use homelier words, they tried to throw a wrench in the machinery of justice. Whatever may have been their purpose, their acts might have made a trial of their clients impossible. Not to punish such behavior summarily, but, instead, to require a long trial of these lawyers,[1] might well be to encourage that sort of behavior. The summary punishment here will tend to deter imitation of

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* This concurring opinion has been revised after a consideration of the petition for rehearing. The previous concurring opinion has been withdrawn.

1. See *infra* as to the prolonged character of such a trial.

that behavior in other trials. If it is not deterred, the administration of justice in our courts is highly likely to break down.

The basis of our decision is as simple as that, We affirm these orders, not because the personal "dignity" of the trial judge was affronted; for such dignity, when it exists, manifests itself, needs no punitive safeguards.[1a] We affirm for the plain reason that the crude antics of these lawyers, if copied by lawyers in other cases, would almost surely disrupt trials.

Here we come to the heart of the matter: Preservation of the liberties of citizens, when on trial for crimes charged against them, demands order in the court-room. Absent such order, no trial can be fair. More important, if criminal trials cannot go on in orderly fashion, then the defendants, if unpopular or if members of minority groups, may become the victims of that monstrous substitute for trials—mob violence. The gravest danger to those minorities, on whose behalf the "friends of the court" have spoken, could easily result from a denial of the power of a trial judge to deal with trial-disrupters as the judge has dealt with the lawyers here. In short, the protection of civil liberties calls for sustaining the contempt judgments in this case.

The trial judge, it is urged, committed grave errors at the trial, in that he improperly prevented the lawyers from presenting evidence on their clients' behalf, and from stating objections to his rulings adverse to those clients. Whether he thus erred we do not at all consider on these appeals; those asserted errors will be fully canvassed later, when the appeals of these lawyers' clients are heard by this court. Even, however, if (for the sake of the argument) we were now to assume that the trial judge made those serious mistakes, that fact could not excuse the tac-

[1a] Cf. *Bridges* v. *California*, 314 U. S. 252; cf. Frank, *Courts on Trial* (1949), 256-261.

tics of these lawyers. Often upper courts have reversed convictions because trial judges seriously misbehaved. But the lawyers who ably succeeded in procuring those reversals did not, during the trials, demean themselves in a disgraceful way. Every lawyer knows that brawling at a trial is not an effective means of bringing about the reversal of an erring judge. We have had quoted to us, from the *Canons of Professional Ethics*, a basic principle of the legal profession that "no fear of judicial disfavor or public unpopularity should restrain" a lawyer "from the full discharge of his duty" to his client. But we cannot agree that fearless discharge of that duty requires or permits a lawyer to turn a trial into a bar-room squabble. Nothing in our decision will alarm any lawyer, no matter what client he represents, who behaves as the overwhelming majority of our lawyers fortunately do.

2. Of course, the gravity of the lawyers' misbehavior does not settle the question whether punishment by summary procedure was legally permissible. To that question I now turn.

Undeniably, to punish summarily for contempt—to charge and hold a man guilty of a crime without a trial—is, and should be, a most extraordinary exception in a civilized legal system; ordinarily, in this country an accused person is constitutionally entitled to a trial and before someone other than his accuser. But Congress and the Supreme Court have recognized one exception: The statute and the Rule (promulgated by the Supreme Court) explicitly authorize a trial judge to punish summarily—without a trial before another judge—conduct (a) which is contemptuous and (b) which the judge "saw and heard," it being "committed in the actual presence of the court." The validity of that statute or of that Rule is not challenged here by anyone.

Such exceptional procedure is designed, says the Supreme Court, "to prevent 'demoralization of the court's authority,' before the public."[2] And (other than the conduct described in Specification I) all the acts for which here the judge punished the lawyers were seen and heard by him, and happened in the court-room.

Specification I, however, charges that the lawyers "joined in a wilful, deliberate and concerted effort to delay and obstruct the trial." This, I think, charges something in the nature of a conspiracy; and a conspiracy, inherently, involves an agreement. Although what happened in the judge's presence was powerful evidence of such an agreement, the agreement itself, if there was one, presumably was made out of court; at any rate, it cannot be conclusively presumed that it was made in the judge's presence; it is not entirely inconceivable that the inference of a conspiracy could be rebutted by evidence of matters not seen or heard or considered by the judge. In those circumstances, the judge, I think, could not properly sentence the lawyers under Specification I without a hearing, at which they would have the opportunity to offer evidence tending to show that they had not entered into a conspiracy. As this Specification involves both (a) possible out-of-court conduct and (b) "disrespect to or criticism of" the trial judge himself, I think the hearing (if ever there is one) must, under Rule 42(b), be before another judge.[3] In but

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2 *In re Oliver*, 333 U. S. 257, 275-276; *Cooke* v. *United States*, 267 U. S. 517, 536.

3 Rule 42(b) provides that where the summary procedure is not authorized by Rule 42(a), so that a hearing must be held, that hearing must be before a judge other than the trial judge, if the charged acts of contempt involve "disrespect to or criticism of" the trial judge. But that provision of Rule 42(b) does not apply where summary procedure is authorized by Rule 42(a).

The Advisory Committee, with reference to Rule 42(b), cites the Norris-LaGuardia Act, 29 U. S. C. A. §§101-115. Note that 29 U. S. C. A. §112, provides that the defendant in a contempt proceed-

this one respect, I diverge from Judge Hand and agree with Judge Clark.

But the consequent reversal as to Specification I can have no practical effect. For the sentences of each of the lawyers run concurrently, and the record, as Judge Hand has shown, amply supports the other Specifications.[3a]

3. So far as those Specifications are concerned—since they all charge acts in the court-room, seen and heard by the judge—the question of conspiracy is wholly irrelevant, because Specification I, being distinct and separate, cannot be read into those other Specifications. Nor, I think, was the conspiracy charge imported into them by the trial judge's preliminary remarks. For I agree with Judge Hand that we should ignore those remarks as superfluous, since they are but the equivalent of the action of a trial judge who (after a defendant has been properly held guilty) fixes a long sentence—within the permitted statutory limits—due to his belief that the defendant, out of court and without reference to the case on trial, had misbehaved. It has been held that such a belief has no bearing on the propriety of the sentence itself.[4]

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ing may demand retirement of the judge "if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court. * * *"

3a With exception as to Sacher, of Specifications XV and XVIII, as noted by Judge Hand.

4 See, *e.g.*, *Williams* v. *New York*, 337 U. S. 241; *Bailey* v. *United States*, 284 F. 126, 127 (C. A. 7); *Peterson* v. *United States*, 246 F. 118, 119 (C. A. 4); *Stobble* v. *United States*, 91 F. (2d) 69, 71 (C. A. 7); *Hunter* v. *United States*, 149 F. (2d) 710 (C. A. 6); *State* v. *Martin*, 49 Utah 346, 164 Pac. 500, 502-503; *State* v. *Bjelkstrom*, 20 S. D. 1, 104 N. W. 481, 483; *Cason* v. *State*, 16 Ga. App. 820, 86 S. E. 644, 648.

In *Eckerson* v. *Tanney*, 235 Fed. 415, 418, answering an argument that a recital in a judgment "spoiled" it, Judge Learned Hand said that "the judgment does not reside in its recitals, but in the mandatory provisions." See, to same effect, *Standard Oil Co.* v. *Clark*, 163 F. (2d) 917, 928 (C. A. 2).

4. Putting aside the conspiracy issue, no one asserts that, because the charges involved "disrespect of or criticism" of the judge, the summary procedure was improper.[5] The only argument made against its validity is that the judge did not sentence instantly after each offense occurred. In other words, it is argued that these lawyers are entitled to a trial, and before another judge, for the one and only one reason—apart from the contention (already considered) based on the conspiracy—that the trial judge, instead of acting on the impulse of the moment, restrained himself and sentenced at a later time.

As this delay-argument (which finds no support in any explicit provision of the applicable statute or the Rule) takes several forms, it needs analysis to expose its fallacies. It should first be noted that summary punishment necessarily has none but a future effect, for always that open-court obstruction or interruption of the court's business which justifies such punishment has, in the nature of things, already happened and cannot be prevented by any sort of punishment. No punishment, summary or otherwise, will undo the contempt, ever a thing of the past. Therefore, the exceptional power to punish summarily cannot be founded on the ability to forestall the punished behavior. Summary punishment, then, since its effect is wholly prospective, must be justified solely by the fact that it will tend to prevent future misconduct—either (1) in the future course of the same case or (2) in other future cases.

(a) The first form of the delay-argument assumes that here the case was over when (on October 14) the judge entered his contempt orders. In actual fact, it was then by no means over. Not until a week later (on October 21) did the judge (a) have presented to him the motions.

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5 See note 3.

for new trial and arrest of judgment, made by the lawyers on behalf of their clients, and (b) hear lengthy arguments from the lawyers on the sentences to be imposed on those clients, and on the motions for bail, for those clients, pending appeal; only on that day (October 21) did the case terminate in the trial court, with the denial of those motions and the sentencing of the clients.

However, on the mistaken assumption of fact that the case was closed when the judge summarily punished the lawyers, the following argument is advanced:

> Summary punishment is valid only if it will tend, by example, to stop future improper interruptions of the case then before the court—of the very same case in which the interruption happened. If, therefore, an in-court disturbance, no matter how shocking, is not immediately punished, and if, despite that disturbance, the case is not actually broken up but is able to reach its conclusion, summary punishment then imposed cannot serve its primary purpose—i.e., prevention (by example) of further interferences with that particular case—and is always forbidden. Never, it is contended, may the drastic summary method be used when its only possible value (aside from punishing the disturber) will be to deter, by example, similar interruptions of future cases.

In blunt terms, that contention would have this surprising result: Suppose that, in a criminal case, the jury had brought in its verdict and had been discharged; that the trial judge had then at once heard and denied a motion for a new trial; and that he had then sentenced the defendant, thus ending the case. Suppose that, after the defendant and all participants in that case had departed, and while the judge was waiting, in open court, for another case to be

called, someone in the court-room, shouting that the judge was a tyrant, threw an ink-bottle at him. According to this contention, the judge could not validly cite and punish the offender summarily, but would have to accord him a hearing, before another judge, with an opportunity to offer evidence. Why? Because the offense could not possibly disturb any case pending before the court, for there was none, and the summary punishment could do no more than to deter misconduct in other, later, cases.

This contention, even were it sound, could not apply here. For here, as already noted, the case had not ended, so that the punishment of the lawyers could still tend to prevent further disturbances, in the very same case, by those lawyers or other persons.

But we need not consider that here the case had not ended, for the whole theory is unsound. It cannot be squared with the leading decision on the subject of summary contempt procedure, *Ex Parte Terry*, 128 U. S. 289, where the case was over before the disturber was charged with contempt and summarily punished. These were the facts: After the circuit court had concluded its hearing of a pending case, the presiding judge began, in open court, to read the court's opinion embodying its decision of that case. Terry's improper conduct interrupted that reading, and he then left the court-room. The court did not, at once, cite and sentence him. Instead, the presiding judge resumed his reading of the court's opinion. When he finished that reading, that case had ended. Only then did the court cite and summarily sentence Terry for contempt.[6] Obvi-

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6 The facts appear in the report of the *Terry* case in the lower court, *In re Terry*, 36 F. 419, 420 (C. C. Cal.): "As soon as the disturbance had ceased, Justice Field proceeded with the reading of the opinion, after which orders were made by the court adjudging Mr. and Mrs. Terry guilty of contempt, and directing their imprisonment as a punishment therefor."

ously, that summary procedure could not have prevented further interruptions by anyone of the progress of the case which Terry had interrupted. The summary punishment could have served no purpose other than to deter like interference (by Terry or others) with other cases.

It is said, in an attempted distinction of *Terry's* case, that there the delay was short, while here it was long.[7] I fail to understand how the shortness, in *Terry's* case, of the interval between misconduct and punishment can support the in-the-very-same-case argument.[7a] For that shortness cannot alter the basic fact that, in *Terry's* case, the summary punishment could not conceivably tend to prevent anyone from interfering with the orderly progress of the very case in which the improper interference took place; aside from punishing Terry, it could have an effect only in future cases. If, then, an exclusively in-future-cases-deterring effect does not suffice to sustain a summary contempt proceeding, *Terry's* case was wrongly decided. But the Advisory Committee's note to Rule 42(a) —the Rule authorizing summary contempt procedure— reads: "This Rule is substantially a restatement of existing law"; and the note cites *Ex Parte Terry* in support of that statement.

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7 In *Terry's* case, the Supreme Court cited with approval *Middlebrook* v. *State*, 43 Conn. 257, where there was an interval of sixteen days between the contemptuous act and the summary punishment, which was meted out after the case was over. It is suggested that the delay there was justified because the offender had fled the state, and the sixteen days were spent in efforts to bring him back in custody. But if the sole basis of the summary procedure is that it operates to deter further disturbances in the same case, it would be of no significance why the procedure was delayed. For, whatever the reason, the punishment could no longer function as a deterrent of misconduct except as to future cases.

7a The relation of that interval to jurisdiction over Terry's person is discussed *infra*.

That the in-future-cases-deterring effect is the primary reason for permitting summary punishment of in-court contempt appears from *In re Oliver*, 333 U. S. 257. There the lower court had summarily punished misconduct occurring at a secret court hearing. The Supreme Court held the summary procedure constitutionally invalid. After observing (p. 275) that summary punishment may be used only where it is essential to prevent "'demoralization of the court's authority' before the public," the Supreme Court said (p. 276): "Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public."[7b] In other words, the Supreme Court was saying that, since the misbehavior could not be known to other persons, and thus could not stimulate them to obstruct other trials, therefore, on that ground alone, summary punishment was improper. Someone, to be sure, may suggest that the Supreme Court did not have in mind the protection of a "court's authority before the public" through such deterrence of others in other trials, but meant merely the preservation of the judiciary's general glamor or a worshipful public attitude towards judges. But in 1821 the Supreme Court made it plain that the judicial power to punish contempt did not rest on so weak a foundation as the judges' desire for public admiration;[7c] and the

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7b Another ground for the *Oliver* decision is discussed *infra*.

7c See *Anderson* v. *Dunn*, 6 Wheat. 204, 226: "But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. * * * The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights. That 'the safety of the people is the supreme law' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety can-

Supreme Court, in effect, said the same 120 years later, in 1941.[7d] On the basis of the *Oliver* case, appellants argue: "The prevention of such demoralization is the reason for making contempt a crime—not for imposing punishment without trial. It represents the rationale for punishment, not for the method by which it is imposed." A reading of the *Oliver* opinion will answer this argument: The Court, I think, there held that, because there was no demoralization of the court's authority "before the public," summary punishment alone—but, by no means, every other form of punishment for contempt—was improper.

Criminologists disagree concerning the extent to which punishing one man deters other men. But there is general agreement that, in some instances at least, punishment acts both directly, as a preventive example to others, and indirectly, as a means of creating or strengthening social habits of conduct.[8] There can be little doubt that summary punishment of contempt, in a case like this, will have both effects.

Counsel for these lawyers conceded that—so far as the contempt orders rested entirely on in-court acts—the summary procedure would have been beyond complaint if the judge had immediately cited and sentenced for each con-

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not be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution."

7d *Bridges v. California*, 314 U. S. 252. The opinions in the *Bridges* and *Oliver* cases were both by Mr. Justice Black.

8 Concerning the educational value of "law," especially "criminal law," see West, *Conscience and Society* (1945), 165 *et seq.*; West, *A Psychological Theory of Law*, in *Interpretations of Modern Legal Philosophies* (1947), 107; Cahn, *The Sense of Injustice* (1949), 105 *et seq.*

temptuous act, deferring the execution of the several sentences until the trial's end. To the extent that that practice would have been in the interest of fairness, by way of warning to the lawyers, what the judge did here was the equivalent: He repeatedly told the lawyers that he considered their conduct contemptuous, and he repeatedly warned that punishment would ensue. It seems immaterial that some of the warnings indicated punishment by some other authority and not by the judge himself.

Had the judge, in each instance, cited and sentenced immediately—although deferring execution—he would have been obliged to stop this trial more than thirty times, in order to prepare, pursuant to Rule 42(a), written orders specifying, in each instance, the particular contempt. Moreover, in each such instance, the sentenced lawyer would doubtless immediately have appealed, and would have had the right to argue the appeal *pro se*. The trial judge would then have had to adjourn the trial at least thirty times to allow the lawyers to prepare and argue those appeals.

(b) A variant of the delay-argument runs as follows: Summary punishment must be instanter; it is invalid if postponed, even when the delay is not until the case's end. Thus, if the judge waits a day, or a week, or several weeks, he cannot punish summarily, although, as here, the very same case is still in process when he punishes.

This argument puts a premium on hasty action. It means that the judge may act summarily only when he is least likely to be poised and temperate, that only then may he act without a hearing. Why such instant action is fairness or due process—adequately protective of the accused—and postponed action is not, remains unexplained by proponents of this contention. Curiously enough, those who (1) argue that such instant action is an indispensable con-

dition of summary punishment also (2) counsel (and wisely) that the use of the summary power be narrowly circumscribed, for fear that the trial judge, in using it, may do so in haste, spurred to vindictiveness by the anger of the moment. I find it difficult to reconcile those two contentions: The first insists that summary punishment is not valid unless hasty. The second points to the potential danger of haste.

There is such danger. Judges, being human, may, on occasions, respond excessively to slight provocations, if they act impulsively. Where, as here, the judge waited and reflected before he acted, there is considerable assurance that impulsiveness could not have affected him.

We are asked by appellants to believe that the constitutional safeguards of judicial justice in the case of open-court contempts will be best preserved, and that "dictatorial authority" in the punishment of such contempts will be best avoided, if—what? If we instruct trial judges that summary punishment of such contempts must invariably be imposed instanter, which means that trial judges may punish such contempts summarily when—and only when—they act in hot blood, *i.e.*, in circumstances promoting, to the utmost, impatient, ill-considered, judgment. We cannot accept that view. For it seems exactly upside-down.

Consider, for instance, the offenses described in Specification XXXII: The judge attempted to obtain from a defense witness an answer to a single, simple, question; two of the defense lawyers so frequently and persistently interrupted that the judge, worn out and in despair, gave up the attempt, and the question went unanswered. The judge would have been a superman had that almost unexampled misconduct not so raised his blood-pressure as to rob him of the capacity, at or about that time, to deal

calmly with the contempt. Yet appellants assert, in effect, that, if he had at once sentenced those two lawyers, he would have given a decision wholly satisfying the requirements of the Constitution (as well as the statute, the Rule, and our traditions), but that he violated all those requirements because, after the lapse of several weeks, with the case not yet ended, he acted in a mood of greater calmness. It would be a strange topsy-turvy doctrine that justice is carefully and constitutionally administered when a judge explosively goes into high-blood-pressured action, but that it becomes dangerously careless and unconstitutional when the judge, controlling his temper, gives himself a chance to cool off and to act deliberately. It is a quaint idea that a judge's white-hot indignation is better guaranty of justice than his more seasoned judgment.

5. *Ex Parte Terry*, 128 U. S. 289, raised a jurisdictional problem not previously discussed in this opinion. That case arose not on appeal from the contempt order but on an original application in the Supreme Court for a writ of habeas corpus, alleging the circuit court's lack of jurisdiction over Terry's person at the time when it entered the contempt order. In their brief in the Supreme Court (128 U. S. at 291-293), Terry's counsel argued as follows: After creating the disturbance in the circuit court, Terry had left the court-room without being advised that the circuit court proposed to punish him; that court, having made no effort to bring him back, without notice and in his absence adjudged him in contempt and ordered his imprisonment; consequently, he "had no intimation of the existence" of the contempt proceedings "or that they would be instituted"; because he was absent, the circuit court could have obtained jurisdiction of his person only by service upon him of some sort of notice; due to the want of such notice,

the circuit court lacked jurisdiction of his person; therefore, the imprisonment order was void.

The Supreme Court denied the application for the writ, saying in part (128 U. S. at 311, 313-314): "The precise question, therefore, to be now determined, is whether the retirement of the petitioner from the court-room, into another room of the same building, after he had been guilty of misbehavior in the presence of the court * * * defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form? In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment. * * * To say, in case of a contempt such as is recited in the order below, that the of-

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9 The argument (as reported in 128 U. S. at 292-293) reads in part as follows: "The averment of the relator is that when the proceedings in contempt were begun, continued, and ended, he was absent from the court—*had no intimation of the existence of such proceedings or that they would be instituted*, and had no opportunity to be heard. Here, then, is * * * an averment of a fact going directly to the power of the court to either consider the merits or render the judgment of imprisonment. That such fact *of the service required to give jurisdiction* is one always open to proof in attacking a judgment, see *Biddle v. Wilkins*, 1 Pet. 686. * * * We *do not deny that it was within the power of the court instantly, upon the commission, in its presence, of the alleged contempt, and the offender continuing to be present, to adjudge the offending party guilty of contempt, and to order imprisonment. But here the record discloses not only that the petitioner was not instantly proceeded against, but that he was allowed to depart from the court, and was not again brought before it in such a way as to compel him to take notice of all orders and steps in the totally separate and distinct proceedings in the contempt case.*"

fender was accused, tried, adjudged to be guilty and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence."

The Supreme Court, noting that the circuit court entered its order on the same day as Terry's offense, concluded (128 U. S. at 314) that the "jurisdiction" of the circuit court "was as full and complete as when he was in the court-room in the immediate presence of the judges." The Supreme Court left open the following jurisdictional question: "Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and imprisonment for the contempt, *without first causing him to be brought into its presence*, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned. * * *." To this date the Supreme Court has not answered that question.[10] Whether the question is present in this

10 Some indication of the Supreme Court's answer is found in the fact that (as previously noted) the Court in *Terry's* case (128 U. S. at 312) cited and quoted from *Middlebrook* v. *State*, 43 Conn. 257, where the offender, after his misconduct in open court, "left the court-house and the State." There, failing "to procure his attendance" after sixteen days, the court, in his absence, sentenced him for contempt. The Supreme Court quoted a portion of the Connecticut court's opinion which held that "the jurisdiction remained," and concluded: "If it was necessary that the judgment should be preceded by a trial, and the facts found upon a judicial hearing as with ordinary criminal cases, it would be otherwise. But in this proceeding nothing of the kind was required. The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment."

case may be doubted. If it were, I think the Supreme Court would answer that the judge retained jurisdiction of the persons of the several lawyers. For, although they left the court-room after committing the contempts, they voluntarily returned, in connection with their obligations to their clients, in the same case, so that, in that manner and for that purpose, the lawyers were present in court when the judge charged and sentenced them.[10a]

6. The judge had discretion either to proceed summarily or to direct a full hearing. He chose the summary method. Whether any of us, had he been the trial judge, would have made that choice is of no moment. He did not abuse his discretion. He had the power to proceed as he did, in order "to prevent 'demoralization of the court's authority' before the public."

In making up his mind, he could properly take into account that a trial would be long drawn out. What would be the protracted nature of the defense at such a trial was pretty clearly indicated by the suggestion made by Gladstein (see Specification XXXII) that a poll be taken of "the members of the jury and the people of the press" and of others in the court-room as to whether the judge had used "a badgering, bullying and blustering tone" in addressing a witness. For instance, in all likelihood, at a trial of the lawyers, Sacher would introduce the testimony of himself and others in an effort to prove that he was not "angrily shouting," as charged in Specification VII, and did not speak "in an insolent manner," as charged in Specification VIII; Gladstein would similarly seek to prove

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10a The facts in this respect are like those in *In re Maury*, 205 Fed. 626 (C. A. 9).

there he did not "angrily" advance "toward the bench" or make remarks in a "truculent manner," as charged in Specification VIII, and did not speak to the judge "in a sarcastic and impertinent manner," as charged in Specification XI; etc., etc.

It cannot be contended that the summary procedure was inadequate because the judge, before sentencing, did not allow the lawyers to explain their conduct or object to his findings. For immediately after sentencing them, he gave them the opportunity to make such explanations and objections, which, as Judge Hand has shown, were wholly inadequate.

7. Stressing the unquestionably exceptional nature of the summary contempt procedure, these lawyers assert their absolute right to a trial. This assertion they accompany by references to, and quotations from, statements by Mr. Justice Holmes.[11] Those statements, however, are torn from their contexts since, in them, Holmes discussed contempt-punishment for out-of-court acts, and not for in-court acts like those that occurred in this case (and are charged in the Specifications other than Specification I). To yank Holmes' phrases from their settings and then to employ them as bludgeon-like, thought-stopping, slogans,[12] traduces some of Holmes' strongest convictions: Objecting to just such misapplication of a well-known judicial utterance, he remarked, "It is one of the misfortunes of the law

11 See his dissenting opinions in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 422, and in *Craig* v. *Hecht*, 263 U. S. 255, 280.

12 "The use of slogans is natural and, up to a point, beneficial. The point is passed when the slogan is taken for an argument and relevant complexities are ignored." Stebbing, *Thinking to Some Purpose* (1939) 69.

that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[13] And surely there is irony in the invocation of Holmes as a sponsor of undeviatingly absolute rights; for, beyond most men, he had a keen awareness of the inherent limitations of any legal right, when it comes into competition with another. Outstandingly, he cautioned, in effect, that virtually no rights are unqualified; that seldom can a right, hermit-wise, live alone; and that usually isolationism for any single right is socially dangerous.[14]

Also quoted out of context by appellants are sentences in the opinions in *Cooke* v. *U. S.*, 267 U. S. 571, in *In re Michael*, 326 U. S. 224, and in *In re Oliver*, 333 U. S. 257. The *Cooke* case related to out-of-court contempt. *In re*

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13 *Hyde* v. *United States*, 225 U. S. 347, 384, 391.

14 See, *e.g.*, *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." In *American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U. S. 350, 358, he wrote that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified."

Compare the following: "The practical legal * * * art must have as its special province the setting of a limit to opposing conceptions. * * * It is * * * extremely dangerous to abuse [legal principles] by pushing them to extreme; one ruling principle would then cause the rejection of another equally reasonable. * * * Nothing is more dangerous than to allow [simple principles] to be followed to their extreme consequences; in such cases appear the terrors of a great idea in small brains." Demogue, *Analysis of Fundamental Notions* (1911) in the volume *Modern French Legal Philosophies* (transl. 1916) 351, 399, 411, 413. "It is not logical to push a conclusion to an 'extreme,' i.e., further than the facts warrant; on the contrary, a conclusion is logical only if it does follow from the premises upon which it is based." Stebbing, *Thinking To Some Purpose* (1939) 21.

Michael, held that perjury alone did not constitute contempt. In the *Oliver* case, as already noted, the Supreme Court upset the contempt order because the asserted misconduct occurred in a secret hearing. Moreover, that misconduct consisted of Oliver's alleged perjury before the judge, but the judge, in concluding that Oliver had committed perjury, relied upon testimony, contradicting Oliver's, of other witnesses who testified when Oliver was absent. The Supreme Court, on that ground, differentiated that case from those where—as in the case at bar—the judge had observed the contemptuous act; the Supreme Court said (p. 277): "This case would be like the Terry case only if the judge there had not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail after hearing the testimony of witnesses against Terry in Terry's absence."

8. It is argued that our failure to reverse all these orders will invite other trial judges, impatient or oversensitive about their dignity, to exercise the summary contempt power in cases where it should not be exercised. Borrowing again from Mr. Justice Holmes, we may answer, "Not while this court sits." [14a] Long ago a wise man said, "And if it be objected that one who uses such power * * * unjustly might do great harm, that is a charge which may be made * * * against * * * the things that are most useful * * *" [15] Were the possibility of abusing discretionary power to lead to its blanket rejection, all government

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14a *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222, 223.

15 Aristotle, *Rhetoric*, 1355b.

He was referring to the power to argue effectively, but his remark is nonetheless pertinent.

would be paralyzed.[16] We must not, by overly refined distinctions, substantially wipe out the judicial discretion used here, but must—as we shall, whenever necessary in future cases—prevent its misuse.

CLARK, *Circuit Judge* (dissenting):

To one schooled in Anglo-Saxon traditions of legal decorum, the resistance pressed by these appellants on various occasions to the rulings of the trial judge necessarily appears abominable. Yet such natural emotional reaction does not of itself prove that they should be imprisoned without a hearing weeks or months after the events. For the law must both appear and be inexorable rather than vindictive; and the constitutional course of due process requires that conviction and sentence come only after orderly hearing upon announced charges and full opportunity to the accused to defend themselves. True, there is a single exception resting on necessity and common sense. If there are breaches of courtroom behavior to the point of preventing the proper functioning of the court, the judge has the authority to take the necessary steps to secure order. But if the difficulty does not require so drastic steps—has indeed been surmounted without resort to them—and the question is one only of punishment, as retribution and example, then the ordinary requirements of due process must be satisfied. For the person accused of a criminal contempt, like any other accused, is entitled to the opportunity to exculpate himself, so far as his evidence permits, before being sentenced to imprisonment. Hence the immediate issue in this case is not at all as between appropriate pun-

16 See, *e.g.*, Douglas, *Democracy and Finance* (1940) 243ff; Frank, *If Men Were Angels* (1942), Chapters 1, 3, 10 and 12.

ishment and complete immunity from penalty; it is as to the manner in which the question of guilt or punishment can be legally and appropriately tried, or more broadly the course which will best preserve at once the rights of the accused and the dignity of the law in accordance with the highest standards of American justice.

The distinction I have just indicated between summary action for contempt to permit the court to function and the more leisurely but determined course of hearing to settle the punishment for violation of court orders is quite thoroughly settled in the cases. Indeed, it has been vigorously restated only recently by the Supreme Court. "Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. * * * The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'" *In re Oliver*, 333 U. S. 257, 275, 278. Thus, too, the recent Federal Rules of Criminal Procedure, while recognizing the summary contempt power, indicate the extraordinary character of that remedy and prescribe elaborate safeguards of notice and hearing before punishment for the usual contempt. F. R. Cr. Proc. 42.

Against this I find no countervailing precedent to negative the conclusion that this is a unique judgment of summary contempt. This is shown the clearer by considering the time intervals between the specific acts charged and the summary imposition of sentence. In some cases the acts occurred more than eight months before judgment and involved occurrences before the opening of the trial proper. On the other hand, the last acts charged against the lawyer appellants were respectively over four months, over two months, a month and a half, a month, and a month before the sentencing date.[1] The contrast between these time intervals and the extremely short periods of even the more drastic cases relied on is so great as to point its own moral.[2]

In justice to the trial judge it must be pointed out that he acted upon a perfectly rational theory, namely, that of a

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1 Sentence was pronounced October 14, 1949. The last act of contempt (the sole one during the trial proper) charged against appellant McCabe occurred on June 3, 1949, against Isserman, August 3, against Gladstein, August 26, and against Sacher and Crockett, September 14. The last contempt charged against the nonlawyer appellant, Dennis, occurred on October 4.

2 In the single federal case, *In re Maury*, 9 Cir., 205 F. 626, 1913, defendant was held in contempt the morning following the acts complained of and only after he was allowed to speak in his own defense. Resort to state cases as a guide to the contempt power of the federal courts has been termed "treacherous and unscientific." Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, n. 2. Even so, in *In re Willis*, 94 Wash. 180, 162 P. 38, 1917, the defendant left the courtroom immediately after his contemptuous acts, and judgment was pronounced as soon as he was brought before the court the following day. And in *Middlebrook* v. *State*, 43 Conn. 257, 1876, while sixteen days had elapsed between the contempt and the judgment, the defendant had fled the jurisdiction immediately after committing the contemptuous acts and the intervening time was spent in trying to bring him into custody. True, I can discover no statement of the exact time interval in *In re Cary*, 165 Minn. 203, 206 N. W. 402, 1925; but such statements as that this power "must be exercised promptly, if exercised at all," and the reliance upon *Ex parte Terry*, 128 U. S. 289—the leading federal case where the Court continuously insists that the power be exercised "immediately," "instantly," or "without delay"—lead me to doubt its departure from the usual rule.

conspiracy to obstruct justice continuing up to the very end. If such a conspiracy in fact existed and thus continued, then the punishment was deserved and was indeed mild. But notwithstanding the provocation to the judge thus to conclude, this is not a matter of complete demonstration from acts alone. At the basis of any conspiracy is the intent of the parties; if the court refuses to accept testimony as to this, it is deliberately closing its eyes to important evidence. This, therefore, is surely a matter requiring a hearing for the reception of proffered testimony.

But the other alternative, that punishment here may be considered visited on the individual acts, involves a dilemma as great. There are not only the practical difficulties of the judge's own statement that he was punishing for the conspiracy rather than for acts which might well be considered as due to the heat of the trial, and of making sense out of his distribution of penalties, except upon his own rationale of conspiracy.[3] There is also the legal difficulty on the precedents referred to above, since quite obviously this trial was not being and was not broken up, but did in fact proceed to an orderly conclusion, with, indeed, what appears to be an improved attitude at least if the drying up of untoward incidents is any test.[4]

Certain suggested answers are not believed to be adequate. Thus it has been suggested that this was an unusual

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3 Thus the additional severe penalty against the nonlawyer appellant Dennis, who was also one of the convicted defendants, becomes understandable on the court's theory that he was one of the participants, indeed the leader, in the conspiracy. So appellant McCabe's more limited participation in acts charged (see note 1 *supra*) might make his punishment seem drastic unless he was in fact a coconspirator.

4 See the time intervals set forth in note 1 *supra*. So twenty-nine of the thirty-nine acts charged occurred in the first five months of these nine-month proceedings—twelve before the start of the trial proper. The ten acts cited during the last four months of the trial appear to be of a less serious nature than the earlier acts.

case presenting unusual situations. This indeed must be conceded. From the moment the prosecution planned to try so many defendants together on a charge of this nature, it was obvious to all but the most naive—indeed was freely stated in early newspaper comments referred to in the argument—that trial would be extraordinarily difficult, to put it mildly. But such burdens, whether foreseen or not, can hardly justify a change in the law for more summary procedure. One might even believe that the hoped-for gains from a prosecution of this kind would be lost unless it amounted to a demonstration of how American legal processes, operating in ordinary and unwarped fashion, could nevertheless accomplish justice.

Again it has been suggested that since the judge could have acted summarily at the time of each incident he should not lose the right by delaying to save the trial. But if the law is correctly stated above, this is a begging of the question. The matter is one not of honoring the judge's patience, but of following the course set by law for the circumstances as they actually exist. Summary punishment for contempt is not a right of the judge, the exercise of which he may postpone. It is an extraordinary exception to due process of law, justified only by the urgent needs of the moment. When the need for this drastic action passes, the power so to act also passes; and consonant with the long-standing mandate to use "the least possible power adequate to the end proposed," *In re Michael*, 326 U. S. 224, 227; *Anderson* v. *Dunn*, 6 Wheat. 204, 19 U. S. 204, the more orderly processes of notice and hearing must be employed. If the judge had acted immediately to punish summarily what he deemed to be contempts, he would have done so as a responsible decision upon the need then apparent to him; and the issue which would thereupon have been presented to a reviewing court would have been quite different from that now before us. It does not seem to me

appropriate or fruitful to try now to speculate how we might then have decided. The point is that the judge actually decided otherwise, and, with perspicacity if we may conclude from the outcome. Since he did decide to postpone action, our review must be centered upon the legal consequences of that decision in the light of the precedents; these are not properly to be reshaped or reversed by speculation as to a different course he might have taken.

It is suggested, too, that the hearing (which under Rule 42b, Federal Rules of Criminal Procedure, should be before another judge, since the contempt charged "involves disrespect to or criticism of a judge" and thus disqualifies him from sitting except by consent) may be dispensed with because it will produce the same result as has the present proceeding. Due process, however, accords a hearing to those believed to be clearly guilty as well as to those having a good possibility of acquittal. Moreover, on the issue which has become crucial—that of a conspiracy to obstruct justice—I do not see how we can be sure. Upon such an issue the matter of intent looms so large; indeed, the whole question as to the difference between acts done in hot or cold blood can hardly fail to take on a different significance in the light of testimony, subjected to proper cross-examination, of the parties as to their purposes, and what they had agreed to in trial preparation and what was not discussed. We must bear in mind that over and over again the charge consists of pressing a colloquy with the judge—in which the judge participated—to the point of exasperation. I do not see how we can conclude that this was obviously all a matter planned before the start of each colloquy. Moreover, the issue was not alone that of the existence of the conspiracy, but also of the participation of each in one if proven. A hearing was necessary at least to settle the degrees of guilt; quite possibly it would result in much heavier penalties to some than were actually given. A hear-

ing therefore seems to me a prerequisite to punishment as a matter of law.

I would go further, however, and say that a hearing, with full evidence, is wholly desirable on wise policy. What we seek is the proper, decorous, and benign administration of justice. Were that to be promoted by condign punishment here, I, too, should want to reshape a hesitant law to make it possible. But because I believe profoundly that it will be hindered by hasty action here, I find it wiser to stick by the ancient precedents. I go back to what I said earlier that the law should be inexorable, but not vindictive. We cannot wisely permit officers of the court lightly to traduce justice; but on the other hand we cannot afford to overload the sacred responsibility of providing adequate defense for all to the point where it cannot practically be fulfilled. It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the constitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job. Between the two important demands it behooves us to walk circumspectly. I know of no wiser course than to proceed deliberately according to the wisdom of the law as developed in other and perhaps less emotional times, and to approach judgment and punishment deliberately, but by that course the more surely and justly. I would order the proceedings remanded for hearing upon the charges as outlined in the certificate of the judge.

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[fol. 118] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of April, one thousand nine hundred and fifty.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES, Plaintiff-Appellee,

v.

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis, Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court sentencing the appellant Sacher is affirmed except for Specifications I, XV and XVIII, as to which it is reversed; the orders sentencing appellants Gladstein, Crockett, McCabe, Isserman and Dennis are affirmed except for Specification I, as to which they are reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 119] [Endorsed:] United States Court of Appeals, Second Circuit. United States v. Sacher, Gladstein, Crockett, Jr., McCabe, Isserman and Dennis. 175. Judgment. United States Court of Appeals, Second Circuit. Filed April 5, 1950. Alexander M. Bell, Clerk.

United States Court of Appeals

FOR THE SECOND CIRCUIT

October 1949 Term—No. 175

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Defendants-Appellants.

PETITION FOR REHEARING

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United States Court of Appeals

SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. MCCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS, Defendants-Appellants.	No. 175 October 1949 Term

PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Second Circuit:

The appellants herein, hereby respectfully petition for a rehearing of the appeals in this case, with oral argument, and submit the following as the grounds therefor:

I. That the majority decision in effect overrules the Terry case.

A. Judge Hand and Judge Frank both avowedly base their affirmance of the convictions on their extreme condemnation of the conduct of appellants. Thus, Judge Hand describes the holding of the Court in the following language:

> "We merely hold that the acts of these appellants were intolerable, obstructive to an orderly trial and merited summary punishment."

Judge Frank compares the acts of appellants to that of an individual who assaults the pilot of an airplane

in flight, or turns out the lights during a surgical operation, and concludes:

> "We affirm for the plain reason that the crude antics of these lawyers, if copied by lawyers in other cases, would almost surely disrupt trials."

To be sure, if the conduct of the appellants was as evil as the majority of this Court believes, it would merit punishment. But whether conduct warrants punishment and whether punishment should be administered without trial are two very separate affairs. It has never been thought, that under our system of law, the most objectionable conduct, the most heinous of offenses—even those which Judge Frank sees fit to compare with appellants' conduct—may, because of their character, be punished without a hearing. Rapists, robbers, murderers, those whose derelictions are most horrible, open and avowed, who confess to them, boast of them, must be tried before they are convicted, convicted before they are sentenced.

Indeed, the distinction between punishment on the one hand and the manner of its imposition on the other is the very heart of a rational concept of "due process". Yet it is this very distinction which has been erased by the decision of the majority herein. This Court would affirm the denial of a trial on the ground that the conduct merited the punishment imposed; it would relate the nature of the process to the degree of the offense and would thus rewrite the whole body of our constitutional doctrine.

Judge Frank demonstrates with particular clarity the fundamental error in this concept. He says in so many words that the basis upon which he votes to affirm the convictions is that the punishment will deter "imitation of that behavior in future trials". He ascribes to the appellants the argument that the purpose of summary punishment for contempt is to discourage wrongdoing in the case in which the contempt occurs; he then states his disagreement with that proposition and urges that the basis for the summary contempt power is to deter similar conduct in other cases

as well. Upon that basis he proceeds to sustain the punishment of the appellants.

But the appellants have never contended that the power to punish without notice and a hearing was created to deter similar action—whether in the same case or in other cases. It was created as the Supreme Court said in the *Cooke* case for an entirely different reason—to meet the "need for the immediate penal vindication" of the Court's dignity and authority. Deterrence of criminal conduct is of course one of the functions of all criminal punishment; one of the elements to be considered in fixing the degree of punishment for any crime—including contempt of court—is its proper deterring influence on the minds of other would-be criminals. But it has never been considered that the *procedure* adopted for dealing with offenses has anything to do with the deterrence of other offenses of the same kind.

The determination of procedure is based upon wholly different considerations from the determination of the punishment which is to flow therefrom. Under our system of civilized jurisprudence, the only relationship between the degree of the offense and the procedure for punishment is that in some jurisdictions a person accused of a *petty* crime may be tried *more summarily* than one charged with a more serious offense. The gravity of the offensive conduct has always been considered to be *additional* reason for affording a full and complete hearing; the contrary proposition has never before been given countenance in the law. Certainly, the distinction between summary procedure used for dealing with violators of parking regulations and the formal trial accorded to a murderer is not based upon a greater desire to deter parking violations than to deter murders.

B. The failure of this Court to distinguish between punishment and trial and to answer the question thrust upon it by the Constitution and the decisions of the highest Court inevitably lead it into a series of inconsistencies in the interpretation of the leading authorties in the field of contempt.

Nowhere is this more clearly shown than in the handling of the *Terry* case, so extensively discussed by both Judges Hand and Frank.

Terry's case was decided exclusively on a question of jurisdiction. Since the matter came to the Supreme Court on habeas corpus the Court considered the one question whether the Circuit Court had "jurisdiction over Terry's person at the time when it entered the contempt order".

In referring to the contempt statute, Justice Holmes has said (*Craig* v. *Hecht* at p. 281) that the exercise of the contempt power should always "be treated as a question of jurisdiction". He declares that "the statute puts it as a matter of power" and that therefore the words of the statute "should be taken literally".

Although Justice Holmes was speaking in a case of contempt by publication, his statement as to jurisdiction is equally applicable here. He said, "it seems to me that the statute on its face principally limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work. But, wherever the line may be drawn it is a jurisdictional line".

In order to establish jurisdiction so that the power to punish for contempt may be exercised, there must first be present clear and unequivocal proof of "an obstruction to the performance of judicial duty resulting from an act done in the presence of the court". This, said Chief Justice White, in *Ex Parte Hudgings*, 249 U. S. 378, at p. 383, is "the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is asserted * * * ". Any other view, said the Chief Justice, "either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power".

While this is a basic characteristic for the exercise of jurisdiction to punish any contempt at all, it does not alone justify the exercise of summary power to punish for con-

tempt unless another essential requirement for the exercise of jurisdiction is also present. Justice Holmes has summarized it in his dissenting opinion in the *Toledo* case (38 Supreme Court at p. 566) as follows: "I would go as far as any man in favor of the sharpest and most summary enforcement of order in the court and obedience to decrees, but when there is *no need for immediate action* contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts". (Emphasis supplied.)

Chief Justice Taft, in the *Cooke* case, in commenting upon the exercise of the summary power as an exception to the "ordinarily indispensable hearing before judgment constituting due process", said that "the need for immediate penal vindication of the dignity of the court created" the exception to the ordinary constitutional processes and was the basic characteristic upon which the power summarily to punish for contempt must rest (at p. 535). Thus, *the need for immediate action* was recognized to be the basis of jurisdiction in summary contempt cases.

But this proposition is rejected by the majority opinions. Judge A. N. Hand held "that the punishment should follow the acts of contempt with reasonable promptitude, but that the degree of promptitude depends upon the particular facts of each case, and that the punishment need not follow immediately * * *" (p. 1073). He cites three state court decisions and quotes at length from one of them (*In re Cary*). That opinion is authority for the proposition "that it does not follow that jurisdiction is lost by waiting for a more fitting or convenient time". And, again, the Court "may defer action * * * and does not lose jurisdiction by doing so". In other words, Judge Hand bases the continuance of jurisdiction to impose summary punishment upon the expediency and exigencies of a particular case.

Judge Hand said that if the Trial Judge had punished immediately, "the result would have been to leave the indicted defendants without effective counsel or with the necessity of choosing new counsel—a procedure involving

indeterminable delay" (p. 1070). Judge Hand expressed the view again later in order to exclude the present case from the principles asserted by Justice Holmes.

Judge Frank asserted the same rule of expediency but points it in a different direction. He declared "not to punish such behavior summarily, but, instead, to require a long trial of these lawyers might well be to encourage that sort of behavior". But these matters do not touch the basic problem of jurisdiction. They deal with the merits as a rationale for justifying the "mode of dealing" adopted by the Trial Court (Opinion, p. 1073).

In sustaining the proceedings against Terry, the Supreme Court held "that jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed * * * to immediate punishment * * *". The Supreme Court declared that it was not "an accurate characterization of the present case to say that the petitioner's offense was committed "at a time preceding, and separated from, the commencement of his prosecution". The Court concluded that from the moment jurisdiction attached as the result of the Terry assault upon the marshal until the moment of commitment the Court never voluntarily surrendered or lost it. Said the Supreme Court, "his misbehavior in the presence of the Court, his voluntary departure from the courtroom without apology for the indignity he put upon the Court, his going a few steps, and, under the circumstances detailed by him, into the marshal's room in the same building where the Court was held, and the making of the order of commitment, took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court".

Both majority opinions, as well as Judge Clark's dissent, make reference to the *Middlebrook* case as the authority upon which the Supreme Court placed great reliance in reaching its conclusion in the *Terry* case.

It should be noted that the Supreme Court distinguished the *Terry* case from the *Middlebrook* case in that Terry

"did not attempt by flight to escape punishment for his offense". The *Middlebrook* case was cited only as authority for the proposition that once the jurisdiction attached the Court could not be deprived of it "by the mere flight of the offender" (43 Conn. at p. 268).

In the *Middlebrook* case the Court observed that the contemnor did not claim that he was denied a hearing or that he had no opportunity to appear and purge himself of the contempt or offer any matter in mitigation. The opinion discloses that the Trial Judge attempted to serve notice on Middlebrook to appear and answer to the charge of contempt; that an attachment was issued requiring that he be brought to court to answer to the charge, which attachment could not be served; and further that Middlebrook's attorney in the case which was on trial when Middlebrook perpetrated the assault was notified to appear and be heard on Middlebrook's behalf but defaulted. Thus, the time intervening between the commission of the contempt and the execution of the commitment was devoted to "fruitless attempts to secure his presence in court" to answer why he should not be punished. That is why the Court in the *Middlebrook* case proceeded to exercise the power which it had never voluntarily surrendered "after making reasonable efforts to procure his attendance in court".

Thus, the question that must be answered is whether jurisdiction was either "surrendered or lost by delay" because the Court had voluntarily failed to proceed "to immediate punishment".

If it is true that jurisdiction is not lost "by waiting for a more fitting or convenient time" or that the Court "may defer action * * * and does not lose jurisdiction by doing so" then, the *Terry* case has no meaning at all. In the *Terry* case, "the precise question" which the Supreme Court decided was whether Terry's leaving the courtroom defeated the jurisdiction which it possessed to proceed "to immediate punishment"—to which the Court did in fact proceed. Said the Court: "There is no claim that any more time intervened between the commission of the

contempt and the making of the order than was reasonably required to prepare and enter in due form such an order as the Court, upon consideration, deemed proper or necessary".

Under the rule in the *Middlebrook* case the contemnor could not by flight deprive the Court of jurisdiction. In the *Terry* case the Court held that there was no flight, no intervening interval and the Court did not voluntarily surrender jurisdiction.

Essential to the exercise of jurisdiction was the determination of the Court "to take immediate action". This is true of both the *Terry* and *Middlebrook* cases. It is not true of the present case. This is acknowledged by both majority opinions. In fact, Judge A. N. Hand recognizes that the warnings given by Judge Medina in lieu of "immediate action" were effective. Judge Frank equates the warnings with adjudication but says, nevertheless, that the Judge "was influenced to postpone citation *and* sentencing by the fact that instant action would have interfered with the trial".

C. Judge Hand indicates his relfance upon the *Terry* case as authority for his holding on the present appeal. At the same time, however, he states his conviction that the *Terry* case left open the issue here presented. It is difficult to see how, if that issue was specifically left open by the *Terry* case, the determination of the Court there can be any authority for sustaining the conviction of the appellants here.

Judge Frank does not agree with Judge Hand that the question involved here was the one left undecided in *Terry's* case. What he says, however, is that the alternative presented in the question there left open does not apply since "although they (the appellants) left the courtroom after committing the contempts, they voluntarily returned and were present in court when the Judge charged and sentenced them; therefore neither a notice nor a hearing was required." In essence then Judge Frank is saying that because the defendants voluntarily returned and were

present in court, they are to be denied a hearing, whereas if they had been brought into court upon process and under compulsion, under the rationale of the *Terry* case a hearing would have to be granted. Upon what basis an accused is to lose valuable rights because he comes into court voluntarily rather than under compulsion is not stated and is certainly not to be found in any other reported decision.

Moreover, appellants were not "voluntarily" in court on *contempt proceedings;* they were present for a wholly different and unrelated purpose. After the occurrences of their alleged contemptuous conduct, they left the presence of the Court with the Court's permission. Their departure cannot be said to have "aggravated" any contempt—as the Supreme Court said of Terry's departure;* it was not in defiance of the Court's commands—as in *Middlebrook's* case; it was clearly not an effort by flight to defeat the Court's power to inflict instant punishment for their conduct. The very rationale, therefore, by which the Supreme Court arrived at the conclusion that jurisdiction over the person of Terry was retained after *his* departure without the permission of the court, compels the conclusion that in the present case the Trial Judge's jurisdiction over the persons of the appellants had been lost by their departure with the Court's unconditional approval. Although the Court retained power to deal with the subject matter of their actions, that power could be exercised only by the issuance of appropriate process to bring the persons of the appellants within the Court's jurisdiction for that purpose. Their return to the court for a different purpose could not endow the Court with a jurisdiction it would otherwise lack. Mere presence in court has never before been deemed sufficient to confer jurisdiction over the person in the ab-

* It is interesting to note that *Terry* had never actually left the courthouse. He was detained in the Marshal's office during the entire period of his absence from the room in which the Court sat (36 Fed. at pp. 423, 425, 426). Nevertheless, the Supreme Court deemed him to be absent from the court and considered such absence to raise a grave question of continued jurisdiction.

sence of the service of process; and no one has ventured to suggest that if, under the facts of the present case, any appellants had been absent from the court by reason of illness or for other good cause on the occasion when the others were punished, such absentee could have been punished as well and a warrant of commitment could have been issued without any notice to him and without giving him any opportunity to be heard. Judge Frank urges that the appellants would deny a Court power to impose summary punishment on an individual who created a disturbance in court and threw an inkwell at the Presiding Judge after the completion of a case and while the Court was in the process of adjournment. Appellants would not deny such power provided the incident disturbed the Court's proceeding (including the proceeding of orderly adjournment), all essential elements were seen and heard by the Court, and the Court determined that instant punishment was necessary to vindicate the Court's dignity or authority.

On the other hand, could it be suggested that if the inkwell thrower were permitted by the Judge to leave the court—even after having been warned that he would get his just "deserts"—and nothing were done to him thereafter, the Judge catching sight of him in his courtroom a month or a year later could call him before the bar and without further ado send him off to jail? That would be the result of Judge Frank's rationale; yet he nowhere offers any reason for a failure to reject so outrageous a result as forcefully as it was rejected by the Illinois Court in *People* v. *Burt* (cited at p. 46 of the appellants' main brief).

Again Judge Frank insists that there is no significance to the "shortness" of the interval of time between Terry's offensive conduct and the imposition of punishment. But the Supreme Court itself, in deciding the case, pointed specifically to the enormous significance of the absence of any time interval indicating a "postponement" or "delay" of action, stating (at p. 82):

> "* * * it must not be forgotten that the order of imprisonment shows, and the fact is not asserted to be

> otherwise, that it was made and entered on the same day on which, and, presumably, at the same session of the Court at which, the contempt was committed; and there is no claim that any more time intervened between the commission of the contempt and the making of the order than was reasonably required to prepare and enter in due form such an order as the Court, upon consideration, deemed proper and necessary."

And (at p. 83), the Court, returning to its emphasis upon the significance of the absence of any time interval, said:

> "*His* (Terry's) *misbehavior* in the presence of the court, *his voluntary departure* from the courtroom without apology for the indignity he put upon the court, *his going a few steps*, and, under the circumstances detailed by him *into the marshal's room in the same building where the court was held*, and *the making of the order of commitment took place, substantially, on the same occasion and constituted in legal effect, one continuous, complete transaction*, occurring on the same day and at the same session of the court." (Emphasis supplied.)

Indeed, the interpretations given by Judge Hand and Judge Frank to the decision in the *Terry* case would divest the Supreme Court's extensive preoccupation with the matter of any meaning at all. Certainly, the Court there was not concerned with establishing the power of a Court to punish a direct contempt without a hearing. The whole problem with which it was faced arose from Terry's claim that the deprivation of a hearing was unlawful because (1) he was absent from the courtroom at the time the punishment was imposed, and (2) a period of time had elapsed between the act of contempt and the order of commitment. The Court affirmed the punishment only because it rejected Terry's second claim on the facts, and answered his first as a matter of law by asserting that an individual could not frustrate the exercise of the Court's power to impose immediate punishment by the simple expedient of running away from the Court's presence.

The question left open by the *Terry* case comprehended a state of facts not before the Court. It was whether in the event of Terry's departure from the courthouse without its consent, and continued absence, the Court could, after the lapse of a day or more issue a mandate of commitment to the marshal directing Terry's arrest and imprisonment forthwith, without first issuing process to bring him into court.

But the issue here involved—i.e., whether when a Judge postpones action upon direct contempt, he is required to permit the accused an opportunity to be heard in his defense—was not left open by the *Terry* case. On that issue the Supreme Court spoke unequivocally. It said:

> "It was within the discretion of the Court whose dignity he had insulted and whose authority he openly defied, to determine whether it should, upon its own view of what occurred, *proceed at once to punish him or postpone action until he was* arrested upon process, brought back into its presence, and *permitted to make defense*" (at pp. 82-83).

The appellants do not seek to distinguish the *Terry* case. They rely upon it. They rely upon its clear declaration that "it was within the discretion of the court * * * to determine whether it should, upon its own view of what occurred, proceed at once to punish him or postpone action until he was * * * permitted to make defense" (pp. 82-83). Since in this case the Court below admittedly had decided to "postpone" action, the appellants had to be "permitted" to make defense.

If the *Terry* case has any meaning, the act of postponement or voluntary delay on the part of the Trial Judge was a surrender or loss of jurisdiction to proceed under Rule 42a.

D. The majority of the Court moreover found it necessary to ignore the entire rationale of the subsequent Supreme Court cases in which contempt convictions were set aside. Judge Frank scarcely mentions the *Cooke* and

Oliver cases; indeed he denies the existence here of the very element which the Supreme Court there said created and supported the entire procedure of punishment without trial. Thus, says Judge Frank, the affirmance of appellants' convictions is made "*not* because the personal 'dignity' of the trial judge, or the judiciary in general, was affronted"; yet in the *Cooke* case the very basis for the creation of the summary contempt power was said to be "the need for immediate penal vindication of the dignity of the court."

Judge Frank sees the fact that the allegedly contemptuous conduct occurred in the sight and hearing of the Court as the only precondition for the imposition of punishment, without notice and hearing; but the Supreme Court, in the *Cooke* and *Oliver* cases was careful to demonstrate that other factors were equally vital—indeed, were even more basic to the existence of the power.

Judge Hand, on the other hand, interprets Justice Taft's insistence in the *Cooke* case upon "the need for immediate penal vindication of the dignity of the Court" as meaning "as speedy vindication as was practicable under the circumstances." But such an interpretation undermines the whole basis of Justice Taft's reasoning, and ignores the foundation for the constant and repeated reference of the Supreme Court to the *instantaneous* quality of summary punishment for direct contempt. The reason why a hearing is denied in such cases is precisely *because* the punishment must be visited instantaneously. Because it is immediate, instant punishment that is being imposed, a hearing *cannot* be afforded. If a hearing were afforded the punishment could not be imposed instantaneously. Once there is any interval between the commission of the offense and the imposition of the punishment, there is no reason why a hearing need be denied, and in the absence of an affirmative necessity for denying a hearing, due process requires that one shall be held (see *Gridley* v. *United States*, 44 F. (2) 716, 743).

Judge Frank's opinion rests upon a similar fallacy. He cited the *Cooke* and *Oliver* cases as authority for the propo-

sition that the power to deny notice and hearing in contempt cases—a power he says exists whenever the contempt occurs within the sight and hearing of the Court—"is designed * * * to 'prevent demoralization of the court's authority before the public'." But the prevention of such demoralization is the reason for making contempt a crime—not for imposing punishment without trial. That consideration bears the same relation to the crime of contempt as the desire to protect life bears to the crime of murder or the desire to protect property bears to the punishment of thieves. It represents the rationale for punishment, not for the method by which it is imposed. And Judge Frank's suggestion that the phrase "before the public" signifies a desire to deter future misconduct serves to underline this conclusion; for, as we have seen, the purpose of deterrence is served by criminal punishment; it can bear no relation under due process principles to the denial of a trial.

The discretion of the Judge in a real sense is not to grant or deny the hearing which is at the very core of constitutional due process. His discretion when a contempt occurs in his presence, is to decide whether instantaneous punishment is necessary. If he makes that decision and imposes that punishment, he obviously cannot grant a hearing. On the other hand, if he determines in accordance with the injunction of *Anderson* v. *Dunn* that the dignity of the Court can be vindicated without instantaneous action, or that instantaneous action is undesirable—whether because it would adversely affect the interests of persons on trial or for any other reason—he must grant the alleged contemnors the hearing which the Constitution requires.

Judge Frank finds it "difficult to reconcile those two contentions; the first insists that summary punishment is not valid unless hasty. The second points to the potential damage of haste." But there is no difficulty in effecting a reconciliation if one recognizes the principle to be applied. The power to punish without hearing is reluctantly recognized only because speedy action is sometimes necessary.

At the same time, one should be most careful about concluding that the necessity for such haste does in any case exist. There is nothing strange in the juncture of those propositions. Life presents many situations in which one may accomplish a particular end best by acting in haste (meaning with expedition, dispatch); one must, nevertheless, carefully consider whether the disadvantages involved in such haste do not make it desirable to seek an alternative way of accomplishing that same end, even at the cost of additional difficulty. The appellants place no premium upon haste, unless one looks upon the denial of a hearing as an advantage to the Government or to a judge; but so to look upon it is to flout the very foundation upon which due process rests.

E. The choice presented to the Court below was not that which Judge Hand visualized, namely, "either to abandon all attempts to curb disorderly and contemptuous conduct or very seriously to interfere with the progress of the trial". The choice, if in fact appellants' conduct warranted action against them, was between punishing them immediately without trial, and punishing later only if they were found guilty after adequate hearing. To assert that the alternative suggested by appellants involves the necessity "to abandon all attempts to curb disorderly and contemptuous conduct" is to say that the necessity for granting a trial to those accused of crime involves the abandonment of all attempts to curb criminal acts.

Nor is the issue that which Judge Frank poses, i.e., whether postponed action without a hearing is better for a defendant than instantaneous action without a hearing. Our constitutional fathers have determined for us that the denial of a hearing is evil in any case and is to be avoided at all costs; that issue will not be open so long as the Constitution stands. The evil, however, is tolerated where the Judge concludes that his action must be instantaneous and that he has no alternative. At such a moment, individual rights yield to the needs of the administrative

crisis. Once the crisis is passed, the rights of the individual are inviolate. Since in this case the District Judge admittedly did not so conclude his denial of fundamental constitutional rights cannot be sustained.

The declaration of the Supreme Court in the *Oliver* case that a right to a hearing before one is condemned "is too valuable to be whittled away", should serve to underline the impropriety of the suggestion that the District Judge's vague warnings to the appellants to the effect that some undefined authority would deal with them at a later date, are to be equated to findings of guilt, the imposition of punishment and the suspension of its execution. A general warning has never before been judicially deemed the equivalent of a finding of guilt and a sentence of imprisonment nor indeed of judicial process. The appellants were surely entitled at least to believe that they would have an opportunity to demonstrate before whatever other authority might assume jurisdiction over the matter that their actions were justified and their motives were pure. Even an indictment is deemed to state no more than a charge of misconduct and the person named therein is considered under the law to be innocent until proven guilty at a formal trial. Surely, a Judge's warning is to be set on no higher plane.

F. Judge Frank charges that the appellants have "yank(ed) Justice Holmes' phrases from their settings" and have "employ(ed) them as bludgeon-like, thought-stopping slogans". He accuses the appellants of citing Holmes out of context and of presenting his language in support of ideas Holmes himself would not espouse. The appellants never contended that the cases in which Holmes wrote the language cited were identical in their facts with the case at bar; on the contrary, they pointed out in their brief that the facts differed. But they urged the reasoning of Holmes as a guide to this Court's approach to the problem which here confronted it.

No one can deny that the principle which Justice Holmes espoused was that the contempt power should be reduced to its narrowest possible proportions, that it should never be employed where any alternative existed. This is no slogan; it is a constitutional principle applied and adopted by the Supreme Court in the *Cooke* case, the *Oliver* case, the *Michael* case. And it is a principle without which the remainder of Holmes' reasoning in the opinions cited would be rendered utterly meaningless.

Nor are the Supreme Court's expressions of the vital importance of a hearing in the concept of due process of law mere slogans. They are definitions of the very stuff of which liberty is compounded. Judge Frank himself professes a concern with the possibility that mob violence may prevent fair trials; paradoxically he expresses that concern at the very moment that he sustains convictions in which any kind of trial at all is completely absent. It is strange indeed to support the right to a trial of persons not before the Court on the basis of denying that right to those involved in the case presented for decision.

Judge Frank, as we have seen, insists upon the necessity for his decision in order to deter imitation of the appellants' alleged misconduct. Arbitrary power, to be sure, has a deterring influence. But history demonstrates that it is not misconduct which it deters; misconduct can be adequately dealt with by the imposition of punishment after the ordinary democratic process of notice and hearing. What the denial of due process, the enthronement of dictatorial authority in any branch of government produces is silence and sycophantism. What the decision of this Court will deter is participation by attorneys in any case in which they are likely, because of the activities of the persons whom they represent, to be faced with a hostile Judge, a Judge who will ascribe to them the motives he attributes to their clients and who will give them no opportunity for refutation. And those who do participate will be deterred from performing their duty to their clients as

it should be performed, from proceeding in the forthright and fearless manner that the traditions of the bar prescribe * and that the fulfillment of the Sixth Amendment demands.

II. In rejecting the "conspiracy" finding as the basis of the finding of guilt and punishment on all specifications, this Court substituted its judgment for the clear finding to the contrary in Judge Medina's certificate.

A majority of this Court, consisting of Judges Clark and Frank, have held that Judge Medina could not properly find these appellants guilty of, and sentence them for, a conspiracy without a hearing. Specification I of the contempt certificate, which contained a finding of conspiracy, was, therefore, reversed.

Another majority of the Court, however, consisting of Judges A. N. Hand and Frank, sustained the conviction of the appellants on all other specifications (except XV and XVIII in respect to Sacher), notwithstanding that the unambiguous language of the contempt certificate conclusively demonstrates that Judge Medina adjudged them guilty of the remaining specifications solely because of his finding of a conspiracy.

The language in the contempt certificate to which we refer appears in the first four paragraphs thereof, immediately preceding the enumerated specifications:

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* "The Bar, if it is to continue to exist, if it would restore itself to the dignity and honor which it once possessed, must be bold in defense, and if need be, bold in aggression." Inscription on tablet, below the speakers rostrum in the auditorium of the Association of the Bar of the City of New York, credited to Hon. Samuel J. Tilden, February 1, 1870.

"The conduct of the counsel for Fries merits an abler eulogium than is in my power to make. My gratitude as an American citizen and a friend of liberty will never cease to flow to them, for they stood up against arbitrary conduct and oppression." Remarks of Mr. Rodney on behalf of the prosecution in The Impeachment Trial of Justice Samuel Chase (Report of the Trial, p. 258, Baltimore, 1805).

We respectfully submit that the language has but one meaning—that Judge Medina predicated the finding of appellants' *guilt* on his finding that they had entered into a conspiracy.

Judges A. N. Hand and Frank held that the conspiracy finding did not enter Judge Medina's determination of appellants' guilt; that the language which we have quoted from his contempt certificate should be ignored as "unimportant", "irrelevant" and "superfluous", since it is "but the equivalent of a trial judge's fixing a long sentence—within the permitted statutory limits—due to his belief that the defendant—out of court and without reference to the case on trial—had misbehaved" (Judge Frank's Opinion, p. 1139). We submit that, even if the language to which we have adverted could properly be limited to apply only to the sentences imposed on these appellants, the convictions would have to be reversed. For this being a case of summary punishment for contempt, in which appellants enjoyed none of the safeguards of due process, it was, as we shall show below, reversible error for Judge Medina to take the alleged conspiracy into account, whether in determining guilt *or* in imposing sentence, in view of the holding of a majority of this Court that, in respect to the conspiracy charge, appellants would be entitled not only to notice, hearing and counsel, *but to a hearing before another judge.*

Be that as it may, we submit that the language referred to cannot be given the limited meaning and effect which they did. No rationale is advanced to sustain that limited meaning and effect. Neither opinion points to any language in the contempt certificate which derogates from, or narrows, the natural import and meaning of the language. Both opinions make the flat assertion that this language is only an explanation of the length of the sentence, and not a premise for the finding of guilt.

We respectfully submit that to dismiss the meaningful language, to which we point, as "unimportant", "irrelevant" and "superfluous" is to reject substance and to do

violence to a canon of construction of judgments and decrees. See *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* (8 Cir.), 152 Fed. 849, 852:

> "* * * When the terms of a decree are plain and clear, their ordinary meaning and effect may not be lawfully contracted or extended, unless it appears with reasonable certainty that such was the purpose of the Court; for the legal presumption is that the judge carefully and thoughtfully expressed therein his deliberate intention."

On what theory is the language to be given the restrictive meaning and effect given it in the opinions of Judges Hand and Frank? What is there in any part of the contempt certificate which permits one to say that this language was intended only to explain the length of the sentences imposed, and not to state the premise on which *guilt* was found?

On an earlier occasion, i.e., on November 1, 1949, when these appellants applied for a stay of the execution of their sentences pending appeal therefrom, Judge Frank orally gave indication that he shared their view of the meaning of the language referred to, as appears from the following colloquy between Government counsel and the Court (Tr. 95-97):

> "Mr. Shapiro: May it please the Court, I turn immediately to the question which was suggested by the bench concerning the possibility of an early hearing of the appeal before turning to the other questions. I think the problem arises from the fact that there has been a misconstruction of what Judge Medina did. He did not sentence these people for contempt on the basis of acts which are not specified in the certificate. What he did was to incorporate the trial transcript as showing other illustrations of the same kind of conduct. What he said was: 'I can't pick out all of these acts of misconduct but what I am doing is specifying 40 different acts. I am basing the sentences on those acts. I invite the Court's attention to the record of the whole trial as a background

to see what went on before me,' which is precisely what this Court has done in other cases, in the Bollenbach case. This court looked back to the evidence of the other defendants to see what the conduct of the condemned had been.

"Judge (Learned) Hand: Isn't the Bollenbach case the one where we were reversed?

"Mr. Shapiro: Not on the contempt question, Judge. What we have——

"Judge Frank: *You may be right, but as I heard this read the Judge says: 'I find,' and that is the real basis of his determination, 'I find an agreement, a concert, an understanding'. Then he says—he is giving the specifications, that he finds contempts, and he gives the specific acts which are contemptuous——*

"Mr. Shapiro: Yes.

"Judge Frank: *—in the light of that agreement.*

"Mr. Shapiro: No.

"Judge Frank: Just a minute.

"Mr. Shapiro: Excuse me, your Honor.

"Judge Frank: What precedes it is that he has found an agreement, and he says, 'As isolated quotations from or reference to the transcript can give but a partial view of the acts, statements and conduct above referred to,' from which he inferred the agreement, 'I hereby make the entire record part of these proceedings.' Then he goes on to say that he adjudged the following acts as the contempts upon which he bases the sentence. But the background of that is an agreement which he bases on the entire record. That is the way he made the record.

"Mr. Shapiro: I say to your Honor that the situation is this, and I think it will satisfy the problem you have in mind. The defendants were convicted of several contempts each; they were sentenced separately on each contempt. Now I say, under the established cases, we could take the first specification out of this certificate entirely and the defendants still would have no basis for argument. The only possible problem that could exist then would be whether the sentence which was imposed was excessive in view of the nature of the case. And I say that when you examine the other 39 specifications even that is no problem. Adopting the settled rule that where you

have concurrent sentences, it is the duty of the Appellate Court only to determine whether there is a ground——

"Judge Frank: I am not following you. Do you mean that that part of his finding or opinion, or whatever it may be, which relates to the agreement was a separate specification?

"Mr. Shapiro: Yes, sir. That is precisely what I say.

"Judge Frank: *It does not read that way to me. There is a precedent, an 'accordingly'; 'accordingly' which means in view of what went on before, whether or not there is a capital there. You are trying to divorce it.*" (Emphasis supplied.)

We respectfully submit that the foregoing observations of Judge Frank express the natural import and meaning of the language in the first four paragraphs of the contempt certificate. To describe it now as "superfluous" is to say that an upper court may take greater liberty in construing the decree of a lower court, although it deprives men of their liberty and purports to "recite the facts" with the precision and care in draftsmanship which the law specifically enjoins on the court (Rule 42(a)), than it may in the construction of a statute. The rules of construction are the same for both (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co., supra*). Concerning statutory construction, the United States Supreme Court said in *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48:

> "Congress is not to be presumed to have used words to no purpose. * * * The admitted rules of statutory construction declare that a Legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute."

That Judge Medina's finding of conspiracy, contained in the first four paragraphs of the contempt certificate, constituted the premise for his finding of guilt, as well as the explanation for the sentences he imposed, is clear not only from the express language of the certificate. His

utterances in the course of the trial reveal the Judge's underlying pattern of thought and synthesis. They show that the concept of conspiracy was so integral a part of what Judge Frank would call Judge Medina's "gestalt",* that one cannot conceive how—again to use Judge Frank's language—the finding of conspiracy can be "divorced" from the adjudication of guilt.†

Indeed, such was Judge Medina's absorption with the concept of a conspiracy among the appellants that he included a finding of such conspiracy in his findings of fact and conclusions of law on the jury challenge on October 20, 1949, almost a week after he had sentenced these appellants. The finding reads:

> "24. Trial counsel for the defendants have participated in a wilful, deliberate and concerted effort

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* In his recent work, "Courts on Trial", Judge Frank declares that "gestalt psychology" sheds light on a trial judge's "hunching", and he sums up the main thesis of "gestalt psychology" at page 170 in these words:

> "All thinking is done in forms, patterns, configurations. A human response to a situation is 'whole'. It is not made up of little bricks out of sight, sound, taste and touch. It is an organized entity which is greater than, and different from, the sum of what, on analysis, appear to be its parts. The gestaltist's favorite illustration is a melody: A melody does not result from the summation of its parts; thus to analyze a melody is to destroy it. It is a basic, primary, unit. The melody, a pattern, determines the functions of the notes, its parts; the notes, the parts, do not determine the melody."

On which we offer the observation that the foregoing statements can be true only so long as the parts which constitute the melody remain constant. Remove any of its parts, and the melody is no longer the same melody. So in the instant case, if the first four paragraphs of the contempt certificate are not "played" on this appeal, the contempt certificate on which appellants will be sent to jail will not be the one on which they were convicted by Judge Medina.

For Judge Frank's discussion of "gestalt" in his judicial opinions, see: *Skidmore* v. *Baltimore & O. R. Co.*, 167 F. 2d 54, 68; *Old Colony Bond Holder* v. *N. Y. & N. H. & H. R. Co.*, 161 F. 2d 413, 431, 449-450; *In re Fried*, 161 F. 2d 453, 464, Note 28.

† See C. 1521-2; C. 1526; C. 2839-40; C. 3173; C. 4098.

> to delay the trial of the charges of the indictment by making the challenge to the jury lists and by including in the challenge extravagant charges of discrimination against a multitude of minority groups, which they must have known was unfounded. In the lengthy trial of the jury challenge, they, acting in concert, wilfully engaged in grossly improper tactics for the purpose of obtaining further delay and for the purpose of bringing the administration of justice in this Court into disrepute."*

In light of all the foregoing, how can it be said that when Judge Medina declared in the contempt certificate—

> "Before the trial had progressed very far, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue"—

he was offering only an explanation for the sentences imposed on appellants, and not stating the premise on which he based his adjudication of their guilt?

Suppose, however, that the conspiracy finding did not enter into Judge Medina's determination of appellants' guilt. Suppose that it entered only into his determination

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* This finding was made by the Trial Judge in the *Dennis* case, without any opportunity to the appellants here to contest it. In that case, since they are not parties, they may not have the finding reviewed on the main appeal.

The government's brief attached momentous importance to these findings of Judge Medina. One of its main arguments was that "each act of misbehavior was a component part of a plan of joint action calculated to obstruct the processes of justice, and the aggravated nature of the misconduct can be appreciated only by viewing it as a whole" (p. 32). Also pp. 31, 37, 38, 66, 69, 87 (see Appellants' Reply Brief, pp. 7-9).

of the length of the sentences he imposed, as Judges Hand and Frank have held. Would this immunize these sentences from attack? We submit it would not.

In footnote 4 to his opinion Judge Frank cites a number of decisions which hold that courts may take unrelated out-of-court conduct into account in fixing sentence. All these cases relate to sentences imposed for statutory offenses after a jury verdict. They have no application to the case at bar, which involves summary punishment for criminal contempt. "A contempt proceeding is *sui generis* (*Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326). And the punishment which a judge may impose for a contempt committed in open court in his sight or hearing is governed by a special rule, i.e., Rule 42(a) of the Federal Rules of Criminal Procedure, *which permits a judge to punish only that which he sees or hears in open court.* For Rule 42(a) reads as follows:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

We submit that the foregoing language makes it as clear as anything can be that a judge who, as in the instant case, acts under Rule 42(a) can neither adjudicate guilt nor impose punishment for anything other than that which he sees or hears in open court.

Indeed, more than a score of years *prior* to the adoption of the restrictive provisions of Rule 42(a) the Supreme Court held in *Cooke* v. *United States*, 267 U. S. 517, that a judge could not consider any facts in aggravation of a contempt as charged unless the alleged contemnor was given notice thereof with opportunity to meet or explain them. The appellant in *Cooke* v. *United States, supra*, was a lawyer who had been convicted of contempt for sending a scurrilous letter to the judge. In pronouncing

sentence on the appellant, the judge indicated that he had taken certain facts, other than the letter, into account in fixing appellant's sentence. Writing for a unanimous court, which reversed the conviction, Mr. Chief Justice Taft declared at page 538:

> "On the other hand, when the court came to pronounce sentence, it commented on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court, and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and of employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client. When Walker questioned this, the court directed the marshal to prevent further interruption. *It was quite clear that the court considered the facts thus announced as in aggravation of the contempt. Yet no opportunity had been given to the contemners even to hear these new charges of the court, much less to meet or explain them, before the sentence. We think the procedure pursued was unfair and oppressive to the petitioner.*" (Emphasis supplied.)

See also *Gridley* v. *United States*, 44 F. (2) 716, 743 (C. C. A. 6); *Oates* v. *United States*, 223 Fed. 1013, 1015 (C. C. A. 4).

Clearly the case at bar is governed by *Cooke* v. *United States* and the other cases cited and not by the cases cited by the majority. A rehearing and reversal are, therefore, in order.

III. This Court overlooked appellants' claim that the contempt orders were fatally defective.

In rendering their decision upon this appeal, the majority completely overlooked an important point raised by the appellants in their main brief (p. 20).

The appellants contended that the orders appealed from failed to comply with the requirement to "recite the facts" as required by Rule 42(a) in that the certificate made by the trial judge states that the "acts, statements, and conduct" "gave but a partial view" of the incident. The appellants contended that the certificate is fatally defective because it incorporates by reference the entire record of the *Dennis* case, consisting of more than 21,000 pages of transcript and other proceedings.

The appellants contended that Rule 42(a) was a new rule and the provision in the rule requiring that the order "recite the facts" was an innovation in the federal procedure concerning summary contempts. The appellants, therefore, proceeded to review state court authorities from New York to California in which it had been consistently held that such a certificate or mandate of commitment as is presented in this case is defective and cannot be sustained.

Without reviewing the authorities cited in the main brief (pp. 20-23), it is respectfully urged that the court give consideration to this important question on this application for rehearing. The cases are authority for the proposition that where resort must be had outside the certificate for the "facts" to get a complete view of the basis for the Judge's determination, the orders cannot be sustained.

IV. In view of the reversal of the conspiracy finding the affirmance of the convictions on the individual specifications and the sentences imposed thereon should be reconsidered.

The rejection by the Court of the conspiracy finding is persuasive of the need for re-examination of the individual specifications on which conviction and sentence were upheld. Particularly with reference to the validity of the legal positions taken by the appellants as raised upon the main *Dennis* appeal.

Because the action of this Court is having a serious effect on their professional careers resulting from efforts to discipline attorney-appellants it is respectfully urged that strict justice requires that no conviction on any individual specification should be sustained which is not completely borne out by the record, including the appellants' explanation thereof and, furthermore, that the excessive punishment which was meted out should not be upheld.

Absent the conspiracy finding as the underlying basis of each of the separate specifications, each attorney is entitled to have the Court consider that some or all of the counts on which he has been found guilty are in the light of the appellants' explanations thereof not sustained by the evidence as to warrant the severe punishment imposed. Even if a single count might justify the finding of contempt, any sentence in excess of the reprimand or a fine was excessive. This is particularly true in the light of the preliminary statement made by Judge Medina. Each specification should therefore be reconsidered.

V. A rehearing should be ordered simultaneously with the hearing of the Dennis appeal.

The action of this Court in disposing of the present appeal in advance of the hearing and consideration of the main appeal in the *Dennis* case should be reconsidered to avoid the possibility of grave injustice to these appellants.

The incidents on the basis of which the appellants were convicted of contempt arose entirely out of courtroom conduct related to specific legal issues upon which the Trial Judge was called upon to act. These issues are involved in the main appeal and Judge Hand quite clearly held that the validity of these rulings was not before this Court on this appeal (at p. 1075).

Yet the majority of the Court affirmed convictions of these appellants on matters which this Court will have to

review on the main appeal. These questions are raised in the brief prepared for filing by these appellants as counsel in the *Dennis* case. Here are several examples culled from Judge Hand's opinion:

Although Judge Hand said that the validity of the rulings of the Trial Judge were not being considered, nevertheless he declared that "there seems to be ample reason for the Court's conclusion that the attacks on Judge Knox and the other Judges of the Southern District and on the jury system, the Justice Department, the police, newspapers and the President of the United States were launched with a similar purpose to divert the jury from the real issues and to convert the case into trial of the Government rather than the indicted defendants" (p. 1054). This is one of the substantial questions which this Court is being asked to review on the main appeal. Yet the present affirmance convicts the defendants although the main appeal has not yet been argued. Several other matters are discussed by Judge Hand as the basis for his sustaining Judge Medina's conviction of these appellants. Yet all of these matters are still open for consideration upon the argument of the *Dennis* case appeal. For instance, the challenge to the array for the panels of March 1 and March 7 (Opinion, p. 1057); the demand for a sufficient number of peremptory challenges and the questions arising out of the voir dire (id.). The motions made during the trial to strike certain testimony (p. 1058) and to admit certain evidence as well as the question of the Judge's interference with the examination of witnesses (pp. 1059-1060), the matter of colloquies, objections, arguments and charges against the Court of judicial misconduct (p. 1060), the making of motions for mistrial on these matters are referred to by Judge Hand in his opinion as warranting the action of Judge Medina. Yet all of these questions are of necessity still open and subject to review by this Court when the main appeal is argued.

The appellants took the position before the argument of this appeal that it should have been deferred by this

Court and argued simultaneously with the main appeal. The nature and contents of the majority opinions indicate that this would have been the course most consonant with the interests of justice. It is respectfully urged that now the Court should reconsider its present determination and order a rehearing simultaneously with the argument of the main appeal.

WHEREFORE, defendants-appellants respectfully pray that a rehearing with oral argument be ordered as herein requested and for such other relief as to the Court will seem just and proper.

Dated: May 1, 1950.

Respectfully submitted,

WOLF, POPPER, ROSS & WOLF,
Attorneys for Petitioners-Appellants.

Certificate

As counsel for the petitioners, the defendants-appellants, I hereby certify that the foregoing petition is presented in good faith and not for the purposes of hindrance or delay.

Dated: May 1, 1950.

PAUL L. ROSS,
of Counsel for Petitioners.

[fol. 153] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

against

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis, Defendants-Appellants

Before: Augustus N. Hand, Clark and Frank, Circuit Judges

ON PETITION FOR REHEARING

Wolf, Popper, Ross & Wolf, Attorneys for Petitioners-Appellants; Paul L. Ross, Counsel.

Per CURIAM:

Petition denied.

A. N. H., J. N. F., C. JJ.

Filed May 15, 1950.

[fol. 154] [Endorsed:] United States Court of Appeals, Second Circuit. Filed May 15, 1950. Alexander M. Bell, Clerk.

[fol. 155] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of May, one thousand nine hundred and fifty.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

HARRY SACHER, et al., Defendants-Appellants

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 156] [Endorsed:] United States Court of Appeals, Second Circuit. United States of America v. Harry Sacher, et al. Order. United States Court of Appeals, Second Circuit. Filed May 15, 1950. Alexander M. Bell, Clerk.

[fol. 157] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing: Vol. I, pp. 1a-106a; Vol. II, pp. 1a-761a; & Vol. III, pp. 1-156, inclusive, contain a true and complete transcript of the printed portions of record and proceedings had in said Court, in the case of United States of America, Plaintiff-Appellee, against Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis, Defendants-Appellants, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of June in the year of our Lord one thousand nine

hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fourth.

Alexander M. Bell, Clerk. (Seal.)

[fol. 158] Supreme Court of the United States, October Term, 1949

[Stamp:] Office of the Clerk, Supreme Court, U. S., May 24, 1950

No. —

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis, Petitioners.

vs.

United States of America

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 14, 1950.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of May, 1950.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN, AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PAUL L. ROSS,
MARTIN POPPER,
Counsel for Petitioners.

EARL B. DICKERSON,
PATRICK H. O'BRIEN,
ROBERT W. KENNY,
JOSEPH FORER,
BERNARD JAFFE,
Of Counsel.

THOMAS D. McBRIDE,
Of Counsel for Petitioner McCabe.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN, AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman, and Eugene Dennis pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit, made April 5, 1950 (3 R. 118), which affirmed orders of the United States District Court for the Southern District of New York, entered October 14, 1949 (1 R. 11-16), adjudging petitioners guilty of contempt of court and sentencing them to various terms of imprisonment for

alleged misconduct as defense counsel in the recent trial of the eleven leaders of the Communist Party.[1]

Opinions Below

The three judges who heard petitioners' appeal to the Court of Appeals each took a different view of the case, arrived at a different result, and wrote an opinion. Their opinions have not yet been reported, but appear in the record at 3 R. 1-117.

Statement of the Matter Involved

Eleven members of the National Committee of the Communist Party of the United States were tried in the District Court for the Southern District of New York on the charge (1 D. R. 4) of conspiring "to organize as the Communist Party of the United States of America a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence," in violation of section 3 of the Alien Registration Act of June 28, 1940, 54 Stat. 670-671, commonly known as the Smith Act.[2] *United States* v. *Dennis et al.*, No. C 128-87 in the Southern District.[3]

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[1] The record in this case includes the record of the trial in *United States v. Dennis et al.*, D. C., Southern District of N. Y., No. C 128-87. We use "D.R." to refer to the *Dennis* record and "R." to refer to other portions of the record in this case. Record references will be preceded by a numeral indicating the volume cited.

[2] The indictment thus charged a conspiracy under section 3 of the Smith Act to violate section 2 (54 Stat. 670). The conspiracy provision of the Smith Act, formerly contained in 18 U.S.C. 11, has been eliminated in the revision of 18 U.S.C. as being unnecessary in view of 18 U.S.C. 371, the general conspiracy section of the federal criminal code (See Reviser's Note to 18 U.S.C. 2385). Section 2 of the Smith Act, formerly 18 U.S.C. 10, appears in revised form in 18 U.S.C. 2385.

[3] The case is sometimes referred to (and so in the contempt certificate—

Each petitioner was counsel for one or more defendants in the *Dennis* trial. They are all attorneys, with the exception of petitioner Dennis, who was counsel *pro se* during the jury trial (1 R. 19), having been represented by petitioner McCabe during the preceding jury challenge hearing.

On October 14, 1949, the jury returned a verdict of guilty against all defendants in the *Dennis* case and was discharged (16 D.R. 12519-12522). Immediately thereafter, without notice, hearing, or other opportunity for defense, the trial judge (Hon. Harold R. Medina) adjudicated petitioners guilty of contempt of court for actions which had occurred during the trial (1 R. 81-86). This petition is addressed to the decision which affirmed the contempt orders.

The contempt certificate (1 R. 17-73), purportedly made pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, first recites that the criminal contempts were committed in the presence of the court and were seen or heard by the court. It then continues:

> By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they

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1 R. 17) as *United States* v. *Foster*. William Z. Foster, chairman of the Communist Party of the United States, was a named defendant, but his trial was severed because of his illness (1 D.R. 186).

intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.[4]

Accordingly, I adjudge the following guilty of the several criminal contempts described below:

The certificate then lists forty Specifications on which the petitioners were found guilty, Specification I being the only Specification on which all six petitioners were found guilty. Petitioner Sacher was found guilty on 22 other Specifications, Gladstein on 16, Crockett on 8, McCabe on 5, Isserman on 6, and Dennis on 4. (1 R. 18.)

Each petitioner was given an identical concurrent sentence on each Specification for which he was convicted. Sacher and Gladstein, who had the most Specifications, and Dennis, a layman who had the least, were sentenced to six

[4] The *Dennis* record so incorporated consists of more than 15,000 printed pages.

months imprisonment. Crockett and Isserman were sentenced to four months imprisonment, and McCabe to thirty days imprisonment. (1 R. 11-16.)

Specification I (1 R. 19-20), on which all petitioners were found guilty, and which was subsequently reversed on appeal, is an elaboration of the finding of a conspiracy to obstruct justice made in the initial portion of the certificate. It finds that the petitioners:

> . . . joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster, et al.*, C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment, and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities. (1 R. 19.)

Specification I then lists in subparagraphs a. through m. thirteen general types of conduct which, it finds, the petitioners engaged in "to effect this plan." The Specification does not identify or cite any particular episodes in which this conduct occurred. It is thus not possible to state which portions of the long record of the *Dennis* trial were considered by the trial judge to demonstrate the use of the listed conspiratorial methods. It seems reasonable to assume, however, that paragraphs a. through m. were meant to characterize generally petitioners' conduct in the particular epi-

sodes which are the subjects of Specifications II through XL.

As to the diversionary "attacks" referred to in the forepart of Specification I, identification is also lacking in the Specification. However, it may confidently be assumed, on the basis of a familiarity with the record, that they refer to various motions made by petitioners in the *Dennis* case.[5]

Specifications II through XL (1 R. 20-73) refer to particular, identified episodes which occurred during the nine months of the *Dennis* trial. One to five of the petitioners were found guilty on each of these Specifications. The versions given in the contempt certificate of the incidents which

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[5] The "attack" on the jury system of the District apparently refers to a challenge to the grand jury and petit jury array filed by petitioners and tried by Judge Medina prior to the jury trial. The theory of the challenge was that the jury selection system of the Southern District discriminates in favor of propertied classes and against the poor, manual workers, Negroes, Jews, and other groups. See 17 D.R. 13038-13075. For challenge motions, rulings, etc., see 17 D.R. 13033-13157. The challenge hearing is 1-3 D.R.

The "attack" on the judges of the District apparently refers to a motion by petitioners that the jury challenge be tried by a judge from an outside District. See 17 D.R. 13148.

The "attack" on the Department of Justice apparently refers to objections made by petitioners to the issuance by the Federal Bureau of Investigation of a press release praising a prosecution witness then on the stand "for patriotic assistance to the United States Government" in spying for the FBI while a member of the Communist Party. See 7 D.R. 5064 ff.

The "attack" on the President apparently refers to a motion for mistrial based on the making of a public statement by President Truman on the eve of the opening of the jury trial that petitioner Dennis and William Z. Foster were traitors. See 17 D.R. 13223 ff.

The "attack" on the police of New York City apparently refers to protests against the actions of the police on the day the trial opened in throwing a large cordon of armed, uniformed police around the courthouse and in corridors and rooms of the building. See 1 D.R. 55-82.

The "attack" on the press apparently refers to defense motions for postponement of the trial and mistrial because of the prejudicial climate caused by the inflammatory comment of newspapers and others. E. g., 17 D.R. 12880, 12976, 13323, 13507.

are the subject of Specifications II through XL are inaccurate and misleading when compared to the record.[6]

The 39 incidents which Specifications II through XL involve were selected from three months of the jury challenge hearing and six months of the jury trial. The first of these incidents (Specification II, 1 R. 20) occurred on January 21, 1949, nine months before the contempt adjudications. The latest (Specification XL, 1 R. 72, charged against petitioner Dennis only) occurred on October 4, 1949, ten days before the contempt adjudications. The last incident charged against petitioner McCabe (Specification XXVII, 1 R. 51) occurred on June 3, 1949, against Isserman (Specification XXXII, 1 R. 57) on August 3, 1949, against Gladstein (Specification XXXV, 1 R. 67) on August 26, 1949, and

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[6] We concur with the view of the trial judge (1 R. 18) that the particular incidents do not standing by themselves adequately reflect what occurred. In addition, the descriptions of the incidents as given in the Specifications are misleading on account of misstatements of the record, omissions of relevant matter, and exaggerated characterizations. See the record as follows: as to Specification II, 1 D.R. 383-384; Specification III, 2 D.R. 933; Specification IV, 2 D.R. 1031-1037; Specification V, 2 D.R. 1053-1059; Specification VI, 2 D.R. 1085-1092; Specification VII, 2 D.R. 1133-1142; Specification VIII, 2 D.R. 1660-1661, 1669-1671; Specification IX, 3 D.R. 2095-2098; Specification X, 3 D.R. 2383-2386; Specification XI, 3 D.R. 2403-2404; Specification XII, 3 D.R. 2528-2529; Specification XIII, 5 D.R. 3942-3944; Specification XIV, 5 D.R. 4058-4059; Specification XV, 6 D.R. 4228-4230; Specification XVI, 6 D.R. 4786-4790; Specification XVII, 6 D.R. 4806-4807; Specification XVIII, 6 D.R. 4829-4862; Specification XIX, 7 D.R. 4962-4970; Specification XX, 7 D.R. 5301-5302; Specification XXI, 7 D.R. 5524-5526; Specification XXII, 8 D.R. 6250-6280; Specification XXIII, 8 D.R. 6401-6402; Specification XXIV, 8 D.R. 6519-6522; Specification XXV, 8 D.R. 6552-9 D.R. 6565; Specification XXVI, 9 D.R. 6760-6763; Specification XXVII, 9 D.R. 6839-6847; Specification XXVIII, 9 D.R. 6934-6937; Specification XXIX, 9 D.R. 7085-7088; Specification XXX, 10 D.R. 8042-8045; Specification XXXI, 12 D.R. 9375-9377, 9403-9406; Specification XXXII, 12 D.R. 9508-9584; Specification XXXIII, 12 D.R. 9730-9731; Specification XXXIV, 13 D.R. 9885-9887; Specification XXXV, 14 D.R. 10747-10748; Specification XXXVI, 14 D.R. 10855-10856; Specification XXXVII, 14 D.R. 11210-11213; Specification XXXVIII, 15 D.R. 11418-11423; Specification XXXIX, 15 D.R. 11432; Specification XL, 15 D.R. 11925-11933, 12047-12065.

against Sacher (Specification XXXIX, 1 R. 72) and Crockett (Specification XXXVIII, 1 R. 70) on September 14, 1949—that is, over four months, over two months, a month and a half, a month, and a month before the date of the contempt adjudication.

When the incidents which constitute Specifications II through XL are examined in the record it appears that they were combed from the record toward the close of the trial, that their inclusion in the contempt certificate did not reflect the trial judge's contemporaneous reaction to the events or a contemporaneous belief that they were contemptuous and obstructive, and that the meaning and quality given them in the contempt certificate was assigned after their occurrence. Thus a number of the incidents went completely unnoticed and unrebuked at the time of occurrence.[7] Certain others occasioned admonitions, often minor in tenor, at the time of occurrence, which terminated the incidents without indication by the court that additional punishment was warranted or required.[8] Apt illustrations of the coloration given to incidents by adjudication made long after the event are supplied by Specifications II and VII. Specification II, entered on October 14, 1949, asserts that petitioner Sacher shouted at the Court on January 21, 1949 (1 R. 21). But when Sacher made the remark which is the subject of the Specification the judge took no notice of it and made no mention of shouting (1 D. R. 384-385). Indeed, a few days later the judge commented that Sacher had always spoken "in good taste" (1 D. R. 467-468). Similarly, Specification VII recites that Sacher angrily shouted on

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[7] *Cf.* Specifications II, III, IV, XII, XIII, XV, XVI, XXI, XXIII, XXVI, XXIX, and XL with applicable record portions indicated in footnote 6, *supra*.

[8] *Cf.* Specifications V, VI, VII, VIII, IX, X, XI, XIV XVIII, XIX, XX, XXII, XXIV, XXV, XXVII, XXVIII, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVII, and XXXIX with applicable record portions indicated in footnote 6, *supra*.

February 4, 1949 (1 R. 28). The record shows that on that date the judge asked Sacher to "lower your voice a little bit," and Sacher replied, "All right, your Honor, I am sorry if I am carried away" (2 D. R. 1138).

The contempt certificate asserts (1 R. 18) that it was necessary to postpone the contempt adjudication and sentencing till the end of the *Dennis* trial in order to avoid breaking up the trial.[9] As already indicated, however, a number of the incidents were included in the contempt certificates as after-thoughts and were not contemporaneously considered to be contemptuous or obstructive. In addition, eleven of the incidents in the contempt certificate (Specifications II through XII) occurred during the jury challenge, which was heard without a jury. There was a recess of six days between the end of the challenge hearing and the beginning of *voir dire*, during which period no action against petitioners was taken or suggested (See 3 D. R. 2557).

The contempt certificate expressly finds that the actions described in the Specifications "were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner" to impair the trial judge's health (1 R. 17). The trial judge's view that petitioners were seeking to harass and attack him personally is also elaborated in sub-paragraphs a. through m. of Specification I (1 R. 19-20).

In addition, throughout the *Dennis* trial, the judge openly manifested contempt and hostility toward petitioners and a belief that they were his personal enemies. For example, in open court Judge Medina accused one petitioner of having "deliberately lied" a month earlier.[10] When the peti-

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[9] Of course, the explanation, even if accepted, does not explain why a hearing could not have been held once the adjudication and sentencing had been postponed till the end of the trial.

[10] In reversing Specification XV the Court of Appeals held that there was no basis for the accusation (3 D.R. 18).

tioner expressed resentment, the judge charged that "if you thought you could, you might physically come up to the bench and physically attack me" (9 D. R. 7029).[11]

Throughout the *Dennis* trial, the trial judge expressed the belief that petitioners were engaged in some plot against him personally, the conduct of the trial, and the federal judicial system. The existence of this plot occurred to him as early as the beginning of the second day of testimony in the jury challenge (1 R. 465). A few days later he formally found that the plot existed (2 D. R. 1279), and thereafter he repeated the finding (17 D. R. 13116). Throughout the jury challenge hearing and the jury trial, the trial judge constantly asserted or insinuated that petitioners' motions, objections, arguments, examination of witnesses, scrutiny of prosecution exhibits, etc., were not matters of ordinary and necessary advocacy but were instead manifestations of a conspiracy to disrupt the trial and dis-

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[11] For another instance in which the judge, obviously without warrant, supposed a threatening approach by a petitioner, see 2 D.R. 1670. For other instances in which the trial judge accused petitioners of lying, see 7 D.R. 5316, 9 D.R. 7029, 11 D.R. 8888, 14 D.R. 10560, 10718-10719, 3 D.R. 2092.

Illustrative of the judge's hostile method of addressing petitioners are the following: "I am through being fooled with in this case" (3 D.R. 2276). "If you don't like it you can lump it" (*ibid.*). ". . . up to that same old monkey business again" (3 D.R. 2088). ". . . . just a lot of big talk" (3 D.R. 2083). "People of your kind resent that sort of thing because they want to keep talking all day" (3 D.R. 2251). "You can argue your head off" (3 D.R. 1923). "If you ever get so that you can control your face, I am afraid you will be in a bad way" (3 D.R. 1947). "I don't intend that a single one of you lawyers for the defense shall get away with anything while I am sitting here" (8 D.R. 5902). "Object your head off" (8 D.R. 6116, 11 D.R. 8444). "We will have no more monkey business here" (12 D.R. 9533). For other instances of abuse of petitioners by the judge, see the incomplete collection at 17 D.R. 13524-75, 13601-13606, 13613-13614.

One of the issues in the appeal, now pending, of the *Dennis* case is alleged prejudicial misconduct of the trial judge.

credit the administration of justice.[12] See, e. g., 2 D. R. 1091, 1279, 1299, 1325, 1660-1669; 3 D. R. 2293; 5 D. R. 3488-3489, 3495-3496, 3507-3508, 3636; 6 D. R. 4272, 4539, 4580-4581; 7 D. R. 4597-4598, 5153; 8 D. R. 6116, 6129-6134; 9 D. R. 7020; 10 D. R. 7409, 7930-7931, 8009; 11 D. R. 8163-8166, 8170-8173; 15 D. R. 11889.

The three judges who heard petitioners' appeal to the Court of Appeals for the Second Circuit each took a different view of the case and each wrote an opinion (3 R. 1-117).

Judge Augustus N. Hand voted to affirm Specification I. Judge Frank voted to reverse Specification I on the grounds that the appellants could not be convicted of the conspiracy found therein except after a hearing before a judge other than the trial judge. Since Judge Clark voted to reverse all the Specifications, the convictions on Specification I were reversed by the Court.

Judges Hand and Frank took the view that Specifications II through XL had a status independent of the conspiracy finding. They affirmed the convictions on all these Specifications except that they voted to reverse on the merits as to Sacher's convictions on Specifications XV and XVIII. In treating the merits of Specifications II through XL, Judge Hand's opinion (concurred in by Judge Frank in that respect) seems to have adopted the contempt certificate's

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[12] This attitude is fully evinced in Specification I of the contempt certificate. There the trial judge finds as conspiratorial "attacks" against the administration of justice petitioners' making of a jury challenge and motions addressed to securing a fair jury, a fair environment of trial, and a fair trial. See *infra*, footnote 5. The challenge and motions were all of substantial merit and were of conventional, legal types. Specification I also finds that among the means of carrying out the conspiracy was the making of unsubstantial arguments and objections. The entire record conclusively demonstrates that the judge considered that appellants were conspiring to frustrate justice in attempting by earnest and energetic legal advocacy to obtain the acquittal of their clients.

description of the episodes involved, as distinguished from what appears in the record of the *Dennis* trial.[13]

Judge Clark dissented on the ground that a hearing was required before appellants could be convicted and punished for alleged contemptuous conduct which had occurred long before the adjudication.

Jurisdiction

The judgment of the Court of Appeals was entered on April 5, 1950 (3 R. 118). A petition for rehearing before that court was denied on May 15, 1950 (3 R. 153). By order dated May 23, 1950, Mr. Justice Jackson extended the time for filing this petition for certiorari to and including July 14, 1950 (3 R. 155). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

Questions Presented

1. Whether the summary conviction and sentencing of petitioners for criminal contempt, without notice, hearing, or other opportunity to answer or defend, were consistent with due process and within the power of the trial judge where a substantial time had elapsed since the occurrence of the alleged contemptuous incidents and the trial in which they occurred had been concluded.

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[13] An apt illustration is afforded in the affirmance of Isserman's conviction on Specification VII. That Specification, held by the Court of Appeals to be sustained by the record, states in part: "Mr. Isserman proceeded to argue the matter after the objection was sustained" (1 R. 26). The Court of Appeals stated in part: "In VII, Isserman persisted in argument. . . ." (3 R. 24). The record shows that after the trial court had sustained the objection the following occurred (2 D.R. 1133):

> "Mr. Isserman: Will your Honor hear me?
> The Court: I will hear you."

Nor did the court direct Isserman to close the argument, as suggested in the Specification (*Cf.* 1 R. 26 with 2 D.R. 1134).

2. Whether the trial judge could lawfully convict and punish petitioners without notice or hearing after the conclusion of a nine-months trial on the basis of episodes combed from the record of the trial and endowed in the contempt certificate with a quality and significance which the trial judge did not ascribe to them at the time of their occurrence.

3. Whether, under the circumstances stated in 1 and 2, the trial judge could lawfully convict and punish petitioners for acts considered to be disrespectful to and critical of him.

4. Whether the trial judge could so convict and punish petitioners where he found that they had agreed to engage in conduct intended to impair his health and where he had expressed the belief that they were his personal enemies ready to attack him physically and seeking to discredit him as a judge.

5. Whether it was erroneous for the Court of Appeals to affirm the convictions and sentences on the basis of particular acts set forth in Specifications II through XL, when the actual basis for the convictions and sentences was the trial judge's erroneous finding of a conspiracy, which the Court of Appeals reversed.

6. Whether the contempt certificate violates Rule 42 (a) of the Rules of Criminal Procedure by incorporating by reference the entire record in the trial of *United States* v. *Dennis, et al.*

7. Whether the record supports the convictions and sentences imposed on petitioners.

8. Whether under all the circumstances the punishments imposed are excessive.

Statute and Rules Involved

Title 18, United States Code, Section 401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehaviour of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure:

"Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is dis-

qualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Rule 32 (a) of the Federal Rules of Criminal Procedure:

"Rule 32. Sentence and Judgment

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

Reasons for Allowing the Writ

The writ should be granted because the issues herein present questions of Federal law of great legal and public importance, which should be settled by this Court; because the Court of Appeals has decided these important questions in a way which conflicts with constitutional principles and applicable decisions of this Court; and because the Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I

Summary punishment without notice and hearing for contempt committed in the presence of the court is the one exception in our system of jurisprudence to the requirement that every accused, even if apprehended *in flagrante delicto*, is entitled to a hearing and an opportunity to defend himself. This lone exception to the requirements of procedural due process has been tolerated only on the theory that it is needed to enable courts to function. It is available not be-

cause the right to be heard is derogated when the court is injured, but only because there prevails a superior consideration. A hearing must go by the boards when, and only when, there is no time for hearing if demoralization of the court's authority is to be averted.[14] Only the overriding necessity for immediate punishment justifies denial of hearing. *Re Oliver*, 333 U. S. 257, 275.

The power to punish for contempt without a hearing obviously carries oppressive possibilities. Furthermore, its use tends to injure the administration of justice by impairing public confidence in the integrity and fairness of our judicial system. "It is of the greatest importance that contempt proceedings be put, as far as possible, beyond the reach of even unjust adverse criticism." *Cornish* v. *United States*, 299 Fed. 283, 285, cited with approval in *Cooke* v. *United States*, 267 U. S. 517, 539. For these reasons and because of the exceptional quality of the power, this Court has insisted that the power may be exercised only in the most narrowly confined circumstances. *Cf. Cooke* v. *United States, supra; Re Michael*, 326 U. S. 224; *Re Oliver, supra*.

This case presents, as Judge Clark pointed out below (3 R. 113), "a unique judgment of summary contempt." For the first time in American history lawyers have been sentenced to substantial terms of imprisonment for allegedly contemptuous courtroom conduct. They were so sentenced without a hearing, long after the events had occurred, and at

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[14] But Justice Holmes pointed out that the English courts, even "in more violent days than these," have been able to maintain their authority without using summary punishment for contempt. *Gompers* v. *United States*, 233 U. S. 604, 612. And several American states have without catastrophe abolished the judicial power to punish without hearing for direct contempts. See *Deskins* v. *State*, 62 Cr. (Okla.) 314, 71 P. 2d 502; *Harding* v. *McCollough*, 236 Iowa 556, 19 N. W. 2d 613; *Ex parte Redmond*, 156 Miss. 582, 126 So. 485. Even a court-martial must allow a hearing to one accused of having committed contempt in the face of the court. *Manual for Courts-Martial United States Army*, corrected to April 20, 1943, p. 91.

a time when the granting of a hearing would not have impeded the business of the court or the maintenance of its authority. The episodes on which these convictions without hearing have been sustained were combed out of a nine-months record, and in the culling process the incidents were endowed with a significance and quality which were not contemporaneously considered to be present. The punishment was imposed on petitioners without a hearing by a judge who obviously considered them his personal enemies, who had manifested great bitterness toward them, who had clashed with them throughout a long, hard-fought trial, and who had expressed a conviction that they were plotting to impair his health, to discredit him as a judge, and to subvert the judicial system. Finally, the Court of Appeals sustained the judgment although reversing as erroneous the finding on which the trial judge expressly based the convictions and punishment.

This novel and comprehensive extension of the power to punish for contempt without hearing raises important fundamental issues. Here if ever the "right to be heard in open court before one is condemned" has been "whittled away under the guise of 'demoralization of the court's authority.'" *Re Oliver*, 333 U. S. 257, 275, 278. The expansion of the contempt power made by the decision below establishes a dangerous precedent. It threatens the right of the American people to be represented fearlessly and vigorously by counsel. As Judge Clark pointed out in his dissent below (3 R. 117):

> . . . we cannot afford to overload the sacred responsibility of providing adequate defense for all to the point where it cannot practically be fulfilled. It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the con-

> stitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job.

The decision below, moreover, establishes a procedure which tends to intimidate counsel in all cases. No matter who the parties or what the nature of the case, no trial lawyer is safe in carrying out his high obligation of vigorous defense of his client even to the point of resisting a judge's misconduct or oppression if he can be punished without hearing by the same judge, on the basis of incidents singled out as contempts long after they had occurred in the trial which had terminated.

The decision below, if unreversed, establishes a precedent which has neither justice nor the appearance of justice. It upholds the power of a judge to condemn without a hearing those against whom he is personally embittered for their alleged attacks on him, at a time when no possible reason exists for dispensing with a hearing before a neutral judge. This precedent is established, furthermore, in a case which involved lawyers for the leaders of an unpopular political party, tried for their political advocacy in a hostile public environment.

The entire record fully demonstrates that petitioners were punished, whether or not the trial judge was conscious of the fact, not because they were contumacious or obstructed the trial or sought to discredit our judicial system, but because they vigorously defended the leaders of the Communist Party. But it is enough to warrant review by this Court that the Court of Appeals has approved a procedure which facilitates the type of oppressive judicial action here suggested, and this without any over-riding consideration in favor of the procedure.

We are witnessing presently savage attacks not only on Communists and others who defend their rights but on the civil liberties of the American people as a whole, liberties which are indispensable to the maintenance of a free society. Now, perhaps more than ever before, it is vital that judicial action be calm, impersonal, consonant with due process, and procedurally discreet. We cannot afford to return to the practices which resulted in the disbarment of Zenger's counsel (see *Trial of John Peter Zenger*, 17 How. St. Tr. 675) and the mistreatment of lawyers who defended those accused under the Alien and Sedition Acts. The correct course in this case was that advised in Judge Clark's dissenting opinion below: "I know of no wiser course than to proceed deliberately according to the wisdom of the law as developed in other and perhaps less emotional times, and to approach judgment and punishment deliberately, but by that course the more surely and justly" (3 R. 117).

II

The decision below represents a departure from basic principles of law established by decisions of this Court.

A

The courts are limited in the exercise of the exceptional, drastic, summary contempt power "to the least possible power adequate to the end proposed." *Re Michael*, 326 U. S. 224, 227; *cf. Anderson* v. *Dunn*, 6 Wheat. 204, 231. This end is only for "the present protection of the court from actual interference, and not to postponed retribution for lack of respect for its dignity." Mr. Justice Holmes, dissenting in *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 423; dissenting opinion adopted as the majority view in *Nye* v. *United States*, 313 U. S. 33. Mr. Justice Holmes continued (at 425):

> I would go as far as any man in favor of the sharpest and most summary enforcement of order in court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with any other illegal acts.

In the *Nye* case, *supra*, the Court reaffirmed the principle that punishment without hearing was available only to prevent an instant "demoralization of the court's authority" and to meet "the need for immediate penal vindication of the dignity of the court" (at 536). And in the *Cooke* and *Oliver* decisions, *supra*, this Court again expressly limited the exercise of the power to situations which require instant action.

Since the power is predicated on a need for instant action, it obviously is not available once the time for its necessity has passed. This principle is laid down flatly in *Re Terry*, 128 U. S. 289, 312 (emphasis added).

> It was within the discretion of that Court, whose dignity he had insulted and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed *at once* to punish him *or* postpone action until he was arrested upon process, brought back into its presence, *and permitted to make defense.*

In the present case, the alleged contemptuous acts had occurred long before (some as long as nine months before) the contempt adjudication and sentencing. The trial in which the acts had occurred had come to an end. There was no emergency which required or warranted dispensing with a hearing. The punishment imposed was therefore not "a present protection of the court" but "postponed retribution." Accordingly, there was not present the only factor which permits dispensing with a hearing. Thus the con-

viction of petitioners without a hearing was a flagrant violation of procedural due process.

It is no answer, as contended by the government below, that the court could have punished for the acts when they occurred, and hence that petitioners were not harmed by postponement of adjudication. Such an answer makes the cardinal error of expanding by "logic" a limited exception to the point where it swallows the rule. What harmed petitioners was the absence of a hearing. This was an injury they might have had to endure if and when it was required by the need for immediate vindication of the court's authority. But at any other time petitioners were protected against such an injury by ordinary standards of due process.

Furthermore, the postponement of adjudication harmed petitioners by resulting in their conviction on the basis of a retrospective view of the incidents involved, a view conditioned by the trial judge's appraisal of subsequent events. As Judge Clark stated below: "If the judge had acted immediately to punish summarily what he deemed to be contempts, he would have done so as a responsible decision upon the need then apparent to him; and the issue which would thereupon have been presented to a reviewing court would have been quite different from that now before us" (3 R. 115).

Nor is it an answer, as suggested in Judge Frank's opinion below (3 R. 102), that it was more convenient for the judge to postpone adjudication in order to avoid writing contempt certificates during the pendency of the trial. Basic constitutional rights may not be frittered away to serve administrative advantages, even if they are more weighty than that indicated here. As to such rights "there can be no compromise on the footing of convenience or expedience, or because of a natural desire to be rid of harassing delay."

Ohio Bell Telephone Co. v. *Commission*, 301 U. S. 292, 305. Moreover, if it was more convenient to delay, there was nevertheless no reason, once having delayed, for denying a hearing. And it is true, of course, that the lengthy contempt certificate was in fact written during the trial, since it was invoked at the moment the jury was discharged (1 R. 80-81).

Nothing in Rule 42 permits the fundamental deviation from due process manifested in this case, nor could it do so in the face of the constitutional mandates. Subsection (a) of the Rule obviously can not be considered to overrule the constitutional principles which had been well established when the Rule was drafted. The fact is that the trial judge failed to employ the permissive provisions of 42 (a) at the one time when they were constitutionally available. Thereafter 42 (b) was the controlling rule, and under its express terms, since the contempt charged involved disrespect to or criticism of the trial judge, he could not himself hear the contempt. Rule 42 (b) obviously is designed to serve the constitutional principle that no man should adjudge a controversy in which he is an injured party. The decision below frustrates both the rule and the constitutional principle.

The decision below thus contravenes important principles of the law of contempt established by the decisions of this Court. Judge Augustus Hand, however, considered that whether contempt punishment could be imposed without hearing long after the occurrence of the event was a question which had been left open by this Court in *Ex parte Terry*, 128 U. S. 289, 314, and *Pendergast* v. *United States*, 317 U. S. 412, 419. Even on Judge Hand's view, therefore, a firm basis is supplied for the granting of review by this Court.

However, a correct reading of *Terry* shows that this question was not left open; on the contrary, the Court expressly

declared (at 312) the need to allow opportunity for defense once a real interval of time elapsed between the commission of the act and the time of judgment. The conviction was affirmed because the trial court had not postponed action. The only question which was left open in *Terry* was this: when the need for immediate punishment arises, and the contemnor departs in defiance of the court's authority, may the court on a later day punish the original contempt without first giving a hearing. The court never questioned, but expressly asserted, the need for a hearing if the defendant had not defiantly left and nevertheless punishment had not been immediately imposed.

Judge Frank, while taking a different view of the *Terry* case than Judge Hand, held that here the deferred adjudication without a hearing was permissible because the petitioners had "voluntarily returned" to the court room after the alleged contempts were committed. Thus under Judge Frank's logic, petitioners were rightly denied a hearing because they voluntarily returned to the court for the sole purpose of defending their clients. But, under his view, if they had not so returned but had been brought back under compulsory process, then under the *Terry* rationale a hearing would have been required. Such a theory has no rational basis, nor does it find support in any reported decision.

Only Judge Clark's opinion addressed itself to the point—that since the power to punish without hearing exists only to serve a need for immediate vindication of the court's authority, its purpose and legitimacy vanish once that need has gone.

B

The Court of Appeals rewrote the judgment below by treating as surplusage its expressed rationale. If the words used by the trial court in the contempt certificate are to be given any meaning, then it appears that the certificate is a unified document which rests on the basic finding of a con-

spiracy to obstruct justice. It likewise appears that the trial judge convicted and punished petitioners for the incidents in Specifications II through XL only because they were, in his opinion, the fruit of, or at least accompanied, such a conspiracy. This analysis, derived from the language and structure of the contempt certificate, is corroborated by the circumstance that a number of the incidents were, even on the face of the certificate itself, obviously too minor to warrant independently imprisonment or even a finding of contempt (see *e. g.*, Specifications IV, VII, XII, XV, XXIV, XXX, XXXIII, XXXIV, XXXVI, XL). Furthermore, on no other basis is there a legitimate explanation for the imposition of the severest sentence on Dennis, a layman who was charged in the fewest Specifications.

Nor is this analysis in any way contradicted by the imposition of separate, concurrent sentences on each Specification. For each Specification was, under the trial court's manifested theory, deserving of punishment not in isolation but as the fruit of a conspiracy.

Nevertheless, the Court of Appeals, though reversing the finding of a conspiracy, sustained the convictions and sentences on the basis of the particularized Specifications. The practical result is that petitioners are being punished for a conspiracy which, it has been held, was not legitimately found against them. Certainly they can not be constitutionally punished for conduct which was found contemptuous not by the trial court but by the appellate court which did not see those acts and which did not have the function of adjudicating them. *Cf. Cole* v. *Arkansas*, 333 U. S. 196.

If the construction of the certificate by the court below is correct, then indeed an anomaly occurred. For then not only have petitioners been convicted without a hearing, but they have also been convicted and sentenced without first having been informed of the offenses they committed. The

record shows that prior to imposing sentence the trial court read only the introduction of the contempt certificate and Specification I (1 R. 81-86). Specifications II through XL were not read, nor were copies furnished petitioners at any time before conviction and sentence. The trial judge, then, notified petitioners only of the conspiracy Specification and not of the remaining Specifications, which have now been held to be the only matters as to which the judgments can be sustained. Yet obviously notice of one charge is no notice of an entirely different charge.

By affirming the convictions on the basis of Specifications II through XL while reversing the conspiracy finding, the Court of Appeals in effect rewrote the trial court's judgment to respond to its own reactions. Essentially it committed the same type of error which occasioned its reversal by this Court in *Kotteakos* v. *United States*, 328 U. S. 750.

In the *Kotteakos* case, the Circuit Court affirmed a conviction on the basis that an erroneous charge to the jury was surplusage because the evidence fully sustained a finding of guilt on a proper theory of the case. This Court reversed on the ground that the determination of guilt was a matter for the jury, not for the Circuit Court, and it could not be said with fair assurance that the jury had not been influenced by the erroneous theory advanced in the charge. So here it can not be fairly said that the trial judge, who was responsible for the finding and sentencing, had not been influenced by the conspiracy finding which he had no right to make. On the contrary, all the evidence is to the effect that the conspiracy finding gave overwhelming impulse to his judgment and sentence and was in fact its rationale.

Indeed, the judgments must be reversed even if the erroneous conspiracy finding merely affected the degree of punishment. Thus in *Townsend* v. *Burke*, 334 U. S. 736,

the Court reversed a sentence which was within the trial court's power to make because the trial court took into account inaccurate information as to previous arrests and convictions. The Court stated (at 740-741): "We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence. . . . Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

In *Cooke* v. *United States*, 267 U. S. 517, one of the grounds for reversal of a contempt conviction based on the sending of a scurrilous letter to the judge was remarks made by the trial judge when pronouncing sentence which indicated that he considered the contempt which had been found to have been aggravated by other conduct of the alleged contemnor. The Court held that this procedure "was unfair and oppressive" (at 538).

In this case, even more than in *Townsend* and *Cooke*, the trial judge took into account, as shown by the express terms of his certificate, with respect to the sentences he pronounced an impermissible matter, namely that a conspiracy existed to impair his health and otherwise to attack him and the administration of justice. Accordingly, petitioners have been sentenced improperly and, in any event, excessively.

C

Rule 42(a) requires that "the order of contempt shall recite the facts." The contempt certificate states: "As isolated quotations from or reference to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings." The *Dennis* record, so incorporated, is over 15,000 printed pages.

Accordingly, the certificate, which is the only place in

which the judge undertakes to recite the facts, is not complete on its face. To know with precision what petitioners have been convicted of requires the reading of not only the certificate and order, but a huge quantity of additional material.

As a result, the certificate violates Rule 42(a), subjects the petitioners to possible double jeopardy, and vastly encumbers their right of appeal. So far as we are aware, no federal decision exists as to the significance of such an infringement of Rule 42(a). Under the decisions in states which have comparable requirements that a contempt order must recite the facts, it is clear that such incorporation by reference requires reversal. *Ex parte Battelle*, 277 Pac. 725 (Cal. Sup. Ct.); *People* v. *Truesdell*, 79 N. Y. Supp. (2d) 413. *Cf. People ex rel. Barnes* v. *Court of Sessions*, 147 N. Y. 290, 296; *People ex rel. Palmieri* v. *Marean*, 86 N. Y. App. Div. 278.

This Court should grant review in order to settle the novel question as to whether the federal courts may deal more loosely with the Rule than is permitted under similar provisions of state law.

Conclusion

The writ of certiorari should be issued and the judgment below reversed.

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Supreme Court of the United States

OCTOBER TERM—1950

No. 8201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' BRIEF

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Supreme Court of the United States

OCTOBER TERM—1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' BRIEF

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman, and Eugene Dennis seek reversal of so much of a decision of the United States Court of Appeals for the Second Circuit, made April 5, 1950 (III R. 118), as affirmed orders of the United States District Court for the Southern District of New York, entered October 14, 1949 (I R. 11-16), adjudging Petitioners guilty of contempt of court and sentencing them to various terms of imprisonment for alleged misconduct as defense counsel in the recent trial of the eleven leaders of the Communist Party.*

*The record in this case includes the record of the trial in *United States* v. *Dennis et al.*, D. C., Southern District of N. Y., No. C 128-87. We use "D. R." to refer to the *Dennis* record and "R". to refer to other portions of the record in this case. Record references will be preceded by a numeral indicating the volume cited.

Opinions Below

The three judges who heard the appeal to the Court of Appeals each took an independent view of the case, and wrote an opinion. The opinions are reported at 182 Fed. (2) 416, and appear in the record at III R. 1-117.

Statement of the Matter Involved

I

The eleven members of the National Committee of the Communist Party of the United States were tried in the District Court for the Southern District of New York on the charge (I D. R. 4) of conspiring "to organize as the Communist Party of the United States of America, a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and wilfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence," in violation of Section 3 of the Alien Registration Act of June 28, 1940, 54 Stat. 670-671, commonly known as the Smith Act. *United States* v. *Dennis, et al.*, No. C 128-87 in the Southern District.*

Each Petitioner was counsel for one or more defendants in the *Dennis* trial. They are all attorneys, with the exception of Petitioner Dennis, who was counsel *pro se* during the jury trial (1 R. 19), having been represented by Petitioner McCabe during the preceding jury challenge hearing.

On October 14, 1949, after a nine month's trial, the jury returned a verdict of guilty against all defendants in the

* The case is sometimes referred to (and so in the contempt certificate—1 R. 17) as *United States* v. *Foster*. William Z. Foster, chairman of the Communist Party of the United States, was a named defendant, but his trial was severed because of his illness (1 D. R. 186).

Dennis case and was discharged (I R. 76-80). Immediately thereafter, without notice, hearing, or opportunity for defense, the Trial Judge (Hon. Harold R. Medina) adjudicated Petitioners guilty of contempt of court for conduct which had occurred during the trial (I R. 81-86), and imposed a prison sentence on each Petitioner.

The Judge read excerpts from a contempt certificate (I R. 17-73) which he had theretofore prepared.

The certificate lists forty Specifications on which the Petitioners were found guilty, Specification I being the only Specification on which all six Petitioners were found guilty. Petitioner Sacher was found guilty on 22 other Specifications, Gladstein on 17, Crockett on 8, McCabe on 5, Isserman on 6, and Dennis on 4 (1 R. 18).

Each Petitioner was given an identical concurrent sentence on each specification of which he was convicted. Sacher and Gladstein who had most Specifications, and Dennis, a layman who had the least, were sentenced to six months' imprisonment. Crockett and Isserman were sentenced to four months' imprisonment, and McCabe to thirty day's imprisonment (1 R. 11-16).

The preamble of the contempt certificate reads as follows (1 R. 17-18):

> "In conformity with Rule 42(a), Federal Rules of Criminal Procedure, I hereby certify that the series of criminal contempts set forth below were committed in the actual presence of the court and were seen or heard by the court during the trial of the case of *United States of America* v. *Foster, et al.*, C 128-87, which commenced on January 17, 1949.
>
> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, de-

liberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants sate the overthrow of the Government of the United tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

Accordingly, I adjudge the following guilty of the several criminal contempts described below:"

* * * * * * *"

Specification I (1 R. 19-20), on which all Petitioners were found guilty, and which was reversed by the Court of Appeals, embodied a finding by the Judge that the Petitioners (1 R. 19):

"* * * * joined in a wilful, deliberate, and concerted effort to delay and obstruct the trial of *United States* v. *Foster, et al.*, C 128-87, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advo-

States by force and violence, by attacking the Presiding Judge and all the Judges of this Court, the jury system in this District, the Department of Justice of the United States, the President of the United States, the police of New York City, and the public press of New York and other cities."

Specifications II through XL (1 R. 20-73) refer to courtroom episodes which occurred during the nine months of the *Dennis* trial. One to five of the Petitioners were found guilty on each of these Specifications.

The 39 incidents which Specifications II through XL involve were selected from 7 weeks of the jury challenge hearing and 7 months of the jury trial. The first of these incidents (Specification II, 1 R. 20) occurred on January 21, 1949, nine months before the contempt adjudications. The latest (Specification XL, 1 R. 72, charged against Petitioner Dennis only) occurred on October 4, 1949, ten days before the contempt adjudications. The last incident charged against Petitioner McCabe (Specification XXVII, 1 R. 51) occurred on June 3, 1949; against Isserman (Specification XXXII, 1 R. 57) on August 3, 1949; against Gladstein (Specification XXXV, 1 R. 67) on August 26, 1949; and against Sacher (Specification XXXIX, 1 R. 72) and Crockett (Specification XXXVIII, 1 R. 70) on September 14, 1949—that is, over four months, over two months, a month and a half, a month, and a month before the date of the contempt adjudication.

A number of the incidents went completely unnoticed and unrebuked at the time of occurrence.* Certain others occasioned admonitions, often minor in tenor, at the time of occurrence, which terminated the incidents without indication by the Court that additional punishment was warranted or required.†

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* *Cf.* Specifications II, III, XII, XIII, XV, XVI, XXI, XXIII, XXVI, XXIX, and XL.

† *Cf.* Specifications V, VI, VII, VIII, IX, X, XI, XIV, XVIII, XIX, XX, XXII, XXIV, XXV, XXVII, XXVIII, XXXI, XXXII, XXXIII, XXXV, and XXXIX.

Eleven of the incidents in the contempt certificate (Specifications II through XII) occurred during the jury challenge, which was heard without a jury. There was a recess of six days between the end of the challenge hearing and the beginning of *voir dire*, during which period no action against Petitioners was taken or suggested (see 3 D. R. 2557). There were other short recesses during the trial and before the verdict.

Throughout the *Dennis* trial, the Trial Judge expressed the belief that Petitioners were engaged in some plot against him personally, the conduct of the trial, and the federal judicial system. The existence of this plot, he said, occurred to him as early as the beginning of the second day of testimony on the jury challenge (1 D. R. 465). A few days later, he formally found that the plot existed (2 D. R. 1279), and thereafter he repeated the finding (17 D. R. 13116). There was in addition, the Judge's express declaration, in his certificate, that he was punishing for the conspiracy rather than for the individual acts (I R. 17).

How the Court of Appeals Divided

In the Court of Appeals the Circuit Judges voted as follows:

Judge Augustus N. Hand voted to affirm Specification I. Judge Frank voted to reverse Specification I on the grounds that the Petitioners could not be convicted of the conspiracy found therein except after a hearing before a Judge other than the Trial Judge. Since Judge Clark voted to reverse all the Specifications, the convictions on Specification I were reversed by the Court (I R. 31, 118).

Judges Hand and Frank took the view that Specifications II through XL had a status independent of the conspiracy finding contained in the Preamble and Specification I. They affirmed the convictions on all these specifications except that they voted to reverse on the merits Sacher's convictions on Specifications XV and XVIII (I R. 31, 118).

Judge Clark dissented on the ground that a hearing was required before Petitioners could be convicted and punished for alleged contemptuous conduct which had occurred long before the adjudication; and that such hearing should be before another Judge (I R. 111-117).

Jurisdiction

The jurisdiction of this Court was invoked under 28 U. S. Code, Sec. 1254(1).

Certiorari was denied by order of this Court dated June 4, 1951. Petition for rehearing and certiorari was filed June 15, 1951, and granted on October 22, 1951.

This Court limited review to the following question:

> "Was the charge of contempt, as and when certified, one which the accusing Judge was authorized under Rule 42(a) to determine and punish himself; or was it one to be adjudged and punished under Rule 42(b) only by a Judge other than the accusing one and after notice, hearing, and opportunity to defend?"

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18, United States Code, Section 401:

> "Power of Court
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> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehaviour of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 42 of the Federal Rules of Criminal Procedure:

"Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Summary of Argument

The fundamental characteristics of constitutional due process safeguarded under the Fifth Amendment require that persons charged with crime should be advised of the charges against them; have reasonable opportunity to meet them by way of defense; have the right to representation by counsel; and that the trial or hearing be had before an impartial judge. (*In re Oliver*, 333 U. S. 257, 278; *Ex parte Robinson*, 86 U. S. 505, 513; 19 Wall. 505; *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Tumey* v. *Ohio*, 273 U. S. 510; *Jordan* v. *Massachusetts*, 225 U. S. 167; *Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275.)

I. The constitutional course of due process requires that conviction and sentence come only after hearing upon announced charges and full opportunity to the accused to defend themselves.

There is only one, narrow exception to these due process requirements—contempt of court. It includes only charges of misconduct, in open court, in the sight and hearing of the judge, which disturbs the court's business and where immediate punishment is necessary to prevent demoralization of the court's authority (*Ex parte Terry*, 128 U. S. 289). The Federal Rules of Criminal Procedure recognize this extraordinary exception in Rule 42(a). Absent the extraordinary occasion, Rule 42(b) preserves the constitutional safeguards of notice and hearing before punishment.

The power to punish summarily—without notice, hearing or opportunity to defend is a creature of necessity. It exists only because it is indispensable to the maintenance at all times of the dignity and authority of the court (*U. S.* v. *Hudson*, 7 Cranch 32 (1812); *Anderson* v. *Dunn*, 6 Wheat. 204, 227). In the words of Mr. Chief Justice Taft, the power exists because "to preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical

obstruction or disrespect to the court, when occurring in open court. * * * Such summary vindication of the court's dignity and authority is necessary" (*Cooke* v. *U. S.* 267 U. S. 517, 534). When, however, the Court does not "instantly suppress and punish" conduct and allows the occasion to pass, the justification for denying the requirements of due process does not exist. With the passing of the necessity, the power to punish summarily which is rooted in the necessity and exists only so long as the necessity exists, must also pass (*In re Oliver*, 333 U. S. 257).

The present case presents a unique judgment of summary contempt for which there is no precedent.

The trial was not disrupted; it proceeded to an orderly conclusion. All the incidents charged against the Petitioners had occurred in a more or less distant past—the first, almost nine months before the Judge's contempt certificate was announced on October 14, 1949, the last, ten days before that date. The Judge passed each occasion by without summary action and thereby decided not to take action. When the occasion and the need for the summary action passed, the power of the Judge to act also passed. Summary punishment for contempt was not a right of the Judge, the exercise of which he could postpone. Having failed to act "at once", "instantly" or "immediately", on each occasion, there was no "necessity" for the exercise of the extraordinary, arbitrary power, and the usual processes of notice and hearing were required.

II. The accusing Judge convicted and punished the Petitioners only on the basis of his conclusion in the preamble of the contempt certificate (I R. 17-18) that their conduct was "the result of an agreement between [them] * * * deliberately entered into in a cold and calculating manner" to obstruct the administration of justice and to impair the Judge's health. This "agreement" or "conspiracy" is the gravamen of the contempt adjudication and punishment. The making of such agreement was neither seen nor heard

by the Judge, nor made in his actual presence. He was therefore without power under Rule 42(a) to punish Petitioners as and when he certified the alleged contempt (Cooke v. U. S. 267 U. S. 517; Pendergast v. U. S. 317 U. S. 412; Nye v. U. S. 313 U. S. 33).

III. The constitutional course of due process requires not only that conviction and sentence come after notice, hearing and opportunity to defend, but it also requires that the hearing proceed before an impartial judge (*Tumey* v. *Ohio*, 273 U. S. 510, 532; see also *Jordan* v. *Massachusetts*, 225 U. S. 167). The contempt power under Rule 42(a), is no exception to this requirement of due process. A Judge "must have no interest other than the pursuit of justice" (*Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275). He cannot be both accuser and judge in the same cause. The contempt certificate clearly shows that the trial judge's conviction and punishment of the Petitioners rested, in large part, on his belief and finding that the Petitioners had entered into a conspiracy to impair his health. To the extent that the Trial Judge responded to such beliefs, reactions and events, and formed the conviction that Petitioners had entered into a conspiracy to impair his health, as he declared in his certificate, he was clearly acting as a Judge in his own cause; and his interest therein was such as to render any judgment he might make devoid of due process.

In cases where due process is not involved, Rule 42(b) requires that "if the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

This Court enunciated this as a sound policy to guide the courts in its decision in *Cooke* v. *U. S.*, 267 U. S. 517. The Rule formalizes and embodies this policy. Thus contempt proceedings are sought to be put, "as far as possible beyond the reach of even unjust adverse criticism."

THE ARGUMENT

POINT I

The summary conviction and sentencing of the petitioners for criminal contempt without notice, hearing or opportunity to answer or defend, were inconsistent with due process and beyond the power of the accusing judge, as and when certified by him.

The fundamental characteristics of constitutional due process safeguarded under the Fifth Amendment required that the Petitioners should be advised of the charges against them; have reasonable opportunity to meet them by way of defense; have the right to representation by counsel; and that the trial or hearing be had before an impartial judge. (*In re Oliver*, 333 U. S. 257, 278; *Ex parte Robinson*, 86 U. S. 505, 513, 19 Wall. 505; *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Tumey* v. *Ohio*, 273 U. S. 510; *Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275.)

Petitioners were Entitled to a Hearing on the Contempt Charges

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."
>
> (*In re Oliver*, 333 U. S. 257, 278.)

> "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged."
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> (*Ex parte Robinson*, 86 U. S. 505, 19 Wall. 505, at 513.)

"A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal" (*Windsor* v. *McVeigh*, 93 U. S. 274, 277).

"Achievements of our civilization as precious as they were hard won were summarized by Mr. Justice Brandeis when he wrote that 'in the development of our liberty insistence upon procedural regularity has been a large factor'. Burdeau v. McDowell, 256 U. S. 465, 477 (dissenting). It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence.' In re Oliver, 333 U. S. 257, 273. 'The hearing, moreover, must be a real one, not a sham or a pretense.' Palko v. State of Connecticut, 302 U. S. 319, 327. Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, e.g., Coe v. Armour Fertilizer Works, 237 U. S. 413. *Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated.* Ownbey v. Morgan, 256 U. S. 94; Endicott-Johnson Corp. v. Encyclopedia Press, 266 U. S. 285; see Cooke v. United States, 267 U. S. 517, 536." (Italics added.)

(*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, at p. 164, concurring opinion of Mr. Justice Frankfurter.*)

The power to punish for direct contempt of Court represents the single, extraordinary, exception in the entire body of our jurisprudence, to the otherwise universal application of this principle. And precisely because it is an

* In his separate concurring opinion (at p. 143) Mr. Justice Black declared: "I agree with Mr. Justice FRANKFURTER that the Due Process Clause of the Fifth Amendment would bar such condemnation without notice and fair hearing. My views previously expressed under similar circumstances are relevant here. E.g., dissenting opinion in *Ludecke* v. *Watkins*, 335 U. S. 160, 173, and see *In re Oliver*, 333 U. S. 257.

arbitrary * power, a power that is alien to our traditions and foreign to the very thesis of our governmental structure, its scope has been narrowly confined. This Court has repeatedly indicated its alertness to the danger of those abuses and usurpations which flow from the exercise of so arbitrary a power. It has, accordingly, narrowly circumscribed the area in which it will countenance such exercise.

The nature of the exception, and the rigid limitation upon its application were reviewed by this Court in *In re Oliver*, 333 U. S. 257 (at pp. 274-275):

> "It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry, 128 U. S. 289, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This Court held that under such circumstances *a judge has power to punish an offender at once*, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by *immediate punishment*. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, *and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise*. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat. 204, which had marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.' Id., at p. 231 of 6 Wheat. And see in re Michael, 326 U. S. 224, 227.

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* So characterized by this Court in *Ex parte Terry*, 128 U. S. 289.

"That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards even in contempt cases, was spelled out with emphatic language in Cooke v. United States, 267 U. S. 517, a contempt case arising in a federal district court. There it was pointed out that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. *Furthermore, the Court explained the Terry rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.'* Id., at p. 536 of 267 U. S.

"Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and *where immediate punishment is essential to prevent demoralization of the court's authority * * * before the public.*" (Italics added.)

It is within the framework of these principles as enunciated by this Court that the present case must be examined.

This case presents, as Judge Clark pointed out below (III R. 113), "a unique judgment of summary contempt." For the first time in American history all of the defense counsel in an important and extraordinary criminal trial have been sentenced to substantial terms of imprisonment for allegedly contemptuous courtroom conduct.

They were sentenced without a hearing, long after the events had occurred, and when there was no occasion for the Court to act "at once", "instantly" or "immediately" to prevent "demoralization of its authority" or "vindication of its dignity." The episodes, on which these convictions without hearing have been sustained, were combed out of a nine months record, and in the culling process the incidents were endowed in the certificate with a significance and quality which were not contemporaneously considered to be present. The punishment was imposed on Petitioners without a hearing by a Judge who obviously considered them his personal enemies, who had manifested great bitterness toward them, who had clashed with them throughout a long, hard-fought trial, and who had expressed a conviction that they had conspired to impair his health, to discredit him as a judge, and to subvert the judicial system.

This extension of the power to punish for contempt without hearing raises important fundamental issues. Here if ever the "right to be heard in open court before one is condemned" has been "whittled away under the guise" of prevention of "demoralization of the court's authority" (*Re Oliver*, 333 U. S. 257, 275, 278).

When the Necessity for Immediate Action Passed, the Power of the Trial Judge to Act Summarily, also Passed.

In referring to the contempt statute, Mr. Justice Holmes said (in his dissenting opinion in *Craig* v. *Hecht*, 263 U. S. 255, at p. 281), that the exercise of the contempt power should always "be treated as a question of jurisdiction."

He declared that "the statute puts it as a matter of power." Although Mr. Justice Holmes was writing in a case of contempt by publication, his statements as to "jurisdiction" and "power" are equally applicable here. He said: "it seems to me that the statute on its face principally limits the jurisdiction of the judge in this class of cases to those where his personal action is necessary in a strict sense in order to enable him to go on with his work. But wherever the line may be drawn, it is a jurisdictional line."

The Judge in this case did not act immediately upon the occasion of any incident.*

By passing each occasion by without action, the Trial Judge did not find the necessity for "immediate punishment" in this case—the necessity which is the sine qua non of the power to punish without notice and hearing. When the Court inflicted the punishment, without notice and hearing, there was no present disturbance which called for immediate removal. "Immediate punishment" was *not* essential "to prevent demoralization of the Court's authority." There was no "need for immediate penal vindication of the dignity of the Court", which required dispensing with every shred of constitutional due process.

There is not the slightest suggestion of a reason why, even if the Judge considered the Petitioners guilty of contempt, the due process safeguards embodied in Rule 42(b) could not have been employed on the date when he undertook to act against Petitioners. Is it true to say that at that moment there was something which, "if not instantly suppressed and punished, demoralization of the Court's authority would follow?" (*cf. Cooke* case, *supra*, p. 539). It does not appear how, if the hearing called for under the rule had been granted, the authority of the Court would have suffered or how justice would have been obstructed. We cannot find anywhere in this record

* The judge did not hesitate to "punish immediately" on other occasions during the course of the trial (vide *Hall, Winston, Gates, Green* Proceedings, 176 F. 2nd 78 et seq. (CCA 2, 1949)).

the suggestion of a reason why a lesser power would not have been adequate to the maintenance of the dignity of the Court. Indeed, under these circumstances, the maintenance of such dignity surely called for the application of at least the minimal procedural standards set forth in Rule 42(b).

The answers given by Judges Augustus Hand and Frank do not accord with accepted concepts of due process.

Judge Hand said that the conduct of the Petitioners "merited summary punishment" (III R. p. 29). Judge Frank offered equally indefensible rationales for doing away with the elementary requirements of due process. He considered the Petitioners' crime so enormous that he concluded that "not to punish such behaviour summarily, but, instead, to require a long trial of these lawyers might well be to encourage that sort of behaviour" (III R. p. 91). Furthermore, the lawyers were not entitled to a hearing because their conduct "if copied by lawyers in other cases, would almost surely disrupt trials" (III R. p. 92). Judge Frank concluded that it was necessary to forego the civil liberties of the Petitioners. He declared that "the protection of civil liberties calls for sustaining the contempt judgments in this case" (III R. p. 92). What is said by Judge Frank thereafter is intended to provide a legal justification for his determination to punish the Petitioners because their conduct was as distasteful to him as it was to the Trial Judge.

A person's right to due process, and a judge's power to punish an alleged contempt long after its commission without satisfying the requirement of due process, do not depend on the quality of the defendant's conduct. Due process is not a reward for the good, and the denial of it may not be used as punishment for the guilty. (*Ex parte Quirin*, 317 U. S. 1, 25; *Hill* v. *Texas*, 316 U. S. 400, 406.) Indeed, due process is constitutionally enshrined for all because of the belief that only through due process may the truth be found, and justice be done.

Judge Clark framed the question sharply and directly. In his opinion, he said that whatever reaction one might have to the conduct of the Petitioners as charged by the Judge does not justify imprisonment without hearing. His formulation does aptly frame the issue as follows:

> "* * * If there are breaches of courtroom behavior to the point of preventing the proper functioning of the court, the judge has the authority to take the necessary steps to secure order. But if the difficulty does not require so drastic steps—has indeed been surmounted without resort to them—and the question is one only of punishment, as retribution and example, then the ordinary requirements of due process must be satisfied. For the person accused of a criminal contempt, like any other accused, is entitled to the opportunity to exculpate himself, so far as his evidence permits, before being sentenced to imprisonment. Hence the immediate issue in this case is not at all as between appropriate punishment and complete immunity from penalty; it is as to the manner in which the question of guilt or punishment can be legally and appropriately tried, or more broadly the course which will best preserve at once the rights of the accused and the dignity of the law in accordance with the highest standards of American justice" (III R. pp. 111-112).

A Judge need not exercise the power to punish summarily. If he decides to forego the exercise of the power—even in a situation in which it *might* have been exercised—if he decides to delay the imposition of punishment whatever the reason that may impel him to do so, he must accept the corollary to his determination in favor of delay. Having decided not to proceed by way of infliction of "instant" punishment, he has renounced the foundation for the denial in any case of those rights which inhere in due process, and he is required thereafter to impose punishment for the offense, if any power remains to do so, only after the notice and hearing prescribed by law (e.g. *United States* v. *Gridley*, 44 F. (2d) 716, 717 (CCA 6, 1930)). This

very proposition was given explicit recognition in the *Terry* case. After having ruled that it could not look behind the finding that Terry had been guilty of contempt under the eye of the Court, since the case was before it not on appeal but on application for a writ of habeas corpus, this Court declared:

> "It was within the discretion of that Court, whose dignity he had insulted and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed *at once* to punish him *or* postpone action until he was arrested upon process, brought back into its presence, *and permitted to make defense*" (at p. 312). (Italics added.)

In the present case, the alleged contemptuous acts had occurred long before (some as long as nine months before) the contempt adjudication and sentencing. The trial in which the acts had occurred had come to an end. There was no necessity which required or warranted dispensing with a hearing. The punishment imposed was therefore not "a present protection of the court" but "postponed retribution".* Accordingly, there was not present the only factor which permits dispensing with a hearing. Thus the conviction of Petitioners without a hearing was a flagrant violation of due process.

It is no answer that the Court could have punished for the acts when they occurred, and hence that Petitioners were not harmed by postponement of adjudication. Judge Clark met this argument by reference to the need for adhering to the basic concepts of due process (III R. 115). He said:

> "Again it has been suggested that since the judge could have acted summarily at the time of each incident he should not lose the right by delaying to save the trial. But if the law is correctly stated above, this is a begging of the question. The matter is one not of

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* See dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *U. S.*, 247 U. S. 402, at p. 423.

> honoring the judge's patience, but of following the course set by law for the circumstances as they actually exist. Summary punishment for contempt is not a right of the judge, the exercise of which he may postpone. It is an extraordinary exception to due process of law, justified only by the urgent needs of the moment. When the need for this drastic action passes, the power so to act also passes; and consonant with the long-standing mandate to use 'the least possible power adequate to the end proposed', *In re Michael*, 326 U. S. 224, 227; *Anderson* v. *Dunn*, 6 Wheat. 204, 19 U. S. 204, the more orderly processes of notice and hearing must be employed."

Other answers were suggested below: that this Court by the words "immediate penal vindication of the dignity of the Court" (*Cooke* case, p. 536) meant, as suggested by Judge Hand, "as speedy vindication as was practicable under the circumstances" (III R. 28) or that "the punishment should follow the acts of contempt with reasonable promptitude; but that the degree of promptitude depends upon the particular facts of each case" (III R. 29).

"The need for immediate penal vindication of the dignity of the court created" the exception "to the usual and ordinarily indispensable hearing before judgment constituting due process," this Court declared in the *Cooke* case (at p. 536); therefore, it cannot be said that any postponed action—whether "as speedy * * * as * * * practicable" or "with reasonable promptitude" meets the rigid test that "unless such an open threat to the orderly procedure of the Court and such a flagrant defiance of the person and presence of the judge * * * is not *instantly suppressed and punished*, demoralization of the Court's authority will follow" (id.). By dictionary definition "instantly" means "with urgency; pressingly; without the least delay; at once." "Instantly" retains the implication of absolutely immediate sequence. Either of the alternatives suggested by Judge Hand contemplates delay.

Such answers make the cardinal error of expanding by "construction" a limited exception to the point where it destroys the rule. What harmed Petitioners was the absence of a hearing. This was an injury they might have had to endure if and when it was required by the need for "immediate" vindication of the Court's authority. But at any other time Petitioners were protected against such an injury by ordinary standards of due process.

Furthermore, the postponment of adjudication on each separate occasion harmed Petitioners by resulting in their conviction without hearing on the basis of a view of the incidents involved, which was conditioned by the Judge's conclusion as stated in the preamble that all that happened was the result of a conspiracy. As Judge Clark stated below:

> "If the judge had acted immediately to punish summarily what he deemed to be contempts, he would have done so as a responsible decision upon the need then apparent to him; and the issue which would thereupon have been presented to a reviewing court would have been quite different from that now before us." (III R. 115).

The Tendency Has Been to Restrict the Exercise of the Contempt Power and to Leave Punishment to Regular and Formal Criminal Process

Even where its exercise is accompanied by the safeguards of notice and hearing, the fact that it envisages the imposition of criminal sanctions without affording to the accused all of the protections recognized by our system of jurisprudence has led it to be accepted, reluctantly accepted, as a necessary evil. It is in this sprit that Mr. Justice Holmes besought the Courts to avoid its exercise, enjoining them to remember that:

> "The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. Re MacLeod, 6 Jur. 461. Maintenance of their author-

> ity does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these * * * " (*Gompers* v. *U. S.*, 233 U. S. 604 at p. 612).

More than a hundred years ago James H. Peck, the first Judge of the United States District Court of St. Louis was impeached because he presumed to punish for contempt (though after notice and hearing) an attorney who published a criticism of his decision rendered in a trial in which that attorney had appeared before him. Judge Peck was acquitted, but popular revulsion against the use of the contempt power had repercussions which are felt to the present day. Congress passed the Act of March 2, 1831, which sharply restricted the occasions on which the contempt power could be employed.* When a tendency towards its resurgence began to appear, this Court in *Nye* v. *United States* (313 U. S. 33, 61) pulled it up sharply, declaring (at p. 49) that the history of the statutory prescriptions of the various types of offenses relating to misbehaviour before the Courts required "meticulous regard for these separate categories of offenses * * * so that the instances where there is no right to trial by jury will be narrowly restricted."

In *In re Michael*, 326 U. S. 224 (at p. 227), this Court said:

> "Not very long ago we had occasion to point out that the Act of 1831, 4 Stat. 487, from which Sec. 268 of the Judicial Code derives, represented a deliberate Congressional purpose drastically to curtail the range of conduct which Courts could punish as contempt, *Nye* v. *United States*, 313 U. S. 33, 44-48. True, the Act of 1831 carries upon its face the purpose to leave the courts ample power to protect the administration of justice against immediate interruption of its busi-

* The history of the contempt power has been reviewed in several opinions written in this Court; vide *Nye* v. *U. S.*, 313 U. S. 33; also dissenting opinion of Mr. Justice Frankfurter in *Bridges* v. *California*, 314 U. S. 252, 281

> ness. But the references to that Act's history in the Nye case, supra, reveal a Congressional intent to safeguard constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed.' *Anderson* v. *Dunn*, 6 Wheat. 204, 231".

If it is important narrowly to limit "the instances where there is no right to trial by jury", what is to be said of the instances in which there is no right to trial at all? With what "meticulous regard" must we scrutinize attempts to deprive persons of their liberty without affording them any hearing whatsoever, in which the "inexorable safeguard" of constitutional due process (Brandeis, J., in *St. Joseph's Stockyards Co.* v. *United States*, 298 U. S. 38, 73) is dispensed with?

In some jurisdictions the entire power has been swept away, and notice and hearing have been legislatively established as prerequisite to punishment even for direct contempt (See *Deskins* v. *State*, 62 Cr. 314, 71 P. 2d 502 (Okla., 1937); *Harding* v. *McCullough*, 236 Iowa 556, 19 N. W. 2d 613 (1945); *Ex parte Redmond*, 156 Miss. 582, 126 So. 485 (1930)). Even courts-martial operating under the rigorous discipline of military law may exercise the power to punish for contempt in the face of the Court (a power granted by the Thirty-Second Article of War) only "after giving the party an opportunity to be heard" (Manual for Courts-Martial United States Army, corrected to April 20, 1943, p. 91).

A careful student of the subject points out that:

> "The trend of the Courts in modern times is that even in direct contempt, there should be proceedings wherein the accused should be formally charged, orally or in writing, with the facts alleged to constitute the contempt and complete specification be given in detail. There should be required a hearing by the Court and proof should be required to establish the guilt of the accused" (Dangle, *Contempt* (1939), p. 206).

As this Court has said (*In re Michael*, 326 U. S. 224, 227):

> "The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature and leave determination of guilt to a judge rather than a jury."

POINT II

The contempt certificate shows that the accusing judge punished the Petitioners for "an agreement * * * deliberately entered into in a cold and calculating manner" among other things "to impair my health", the making of which agreement was neither seen nor heard by the judge nor made in his actual presence. He was therefore without power to punish Petitioners under Rule 42(a) as and when he certified the alleged contempt.

A

The accusing judge convicted and punished the Petitioners only on the basis of his conclusion in the preamble of the contempt certificate (I R. 17-18) that their conduct was "the result of an agreement between [them] * * * deliberately entered into in a cold and calculating manner" to obstruct the administration of justice and to impair the Judge's health. This "agreement" or "conspiracy" is specifically declared and found by the judge in such preamble and is the gravamen of the contempt adjudication and punishment.

The portions of the preamble of the certificate which are relevant and decisive are to be found in the second, third and fourth paragraphs. (I R. 17-18).

> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might

understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue.

I find that the acts, statements and conduct of each of the defendants, hereinafter specified, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment. To maintain the dignity of the court and to preserve order in the court room, under these circumstances, was a task of the utmost difficulty. There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. As isolated quotations from or references to the transcript can give but a partial view of the acts, statements, and conduct above referred to, I hereby make the entire record part of these proceedings.

Accordingly, I adjudge the following guilty of the several criminal contempts described below.

The language is all too clear in its meaning to require extended analysis. It is explicit in its declaration that the accusing Judge "would have overlooked or at most merely reprimanded counsel" for the individual acts and statements enumerated in the Specifications, had he regarded them as the result of the heat of controversy or of the zeal of defense. But the Judge concluded that they "were the

result of an *agreement* between these defendants, deliberately entered into in a cold and calculating manner *to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue*" (I R. 17).

After thus stating his conclusion in the second paragraph—that "the acts and statements *to which I am about* to refer were the result of an agreement * * * to do and say these things"—the Judge proceeds in the third paragraph to describe the "acts and statements and conduct" as "a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and misconduct of so grave a character as to make the mere imposition of fines a futile gesture and a wholly insufficient punishment" (I R. 18).

The Judge discloses the direct relation between his finding (second paragraph) that "the acts and statements to which I am about to refer were the result of an *agreement* * * * to do and say these things", and his conviction and punishment of Petitioners for said "acts and statements and conduct" when he says in the fourth paragraph (I R. 18):

> "*Accordingly*, I adjudge the following guilty of the several criminal contempts described below:"

Clearly, the Judge made the alleged "agreement between these defendants, deliberately entered into, in a cold and calculating manner to do and say these things", as stated in the preamble to the certificate, the *gravamen* of his contempt adjudication and punishment. To deny this is to deny all meaning and effect to what is undoubtedly the most forceful and unambiguous language in the Court's certificate, and to do violence to the most elementary canons of construction.

In *Boundary County, Idaho* v. *Woldson*, 49 F. Supp. 600 (N. D. Idaho), the Court said at page 603 (aff'd 144 F. (2d) 17; cert. den. 324 U. S. 843 (1944):

> "A judgment or decree must be construed as a whole so as to give effect to every word and part."

See also *National Surety Corporation* v. *Williams*, 110 F. (2d) 873, 876-77 (C. C. A. 8, 1940), cert. den. 311 U. S. 674.

When the explicit language of the certificate is coupled with the severe and identical punishment which the Judge meted out to each of the Petitioners for each of the Specifications on which he convicted him, then it becomes clear beyond all doubt that the "agreement between these defendants deliberately entered into a cold and calculating manner to do and say these things" found in the preamble was the gravamen of the contempt adjudication and punishment.

The certificate contains 40 Specifications. The Judge imposed on each Petitioner a separate and concurrent sentence on each of the Specifications. Thus, each Petitioner received a separate and identical sentence for each Specification on which he was found guilty, to be served concurrently, as follows: Petitioners Sacher, Gladstein and Dennis, 6 months; Petitioners Crockett and Isserman, 4 months; Petitioner McCabe, 30 days. Sacher with a total of 23 incidents against him and Dennis, the non-lawyer, with a total of five, each received an identical sentence of six months.

When the certificate and its Specifications are analyzed, it becomes clear that each Petitioner was punished solely on the basis of the agreement or conspiracy which the Judge found in the preamble, and the extent to which the Judge believed each Petitioner to have participated in the execution of the agreement or conspiracy. Furthermore, except when considered in the context of an alleged agreement or conspiracy, such as was found in the preamble, no Court could regard each Specification of which a Petitioner was found guilty as being deserving of such identical, harsh

punishment.—Hence the analogy to the rule applied in the case of concurrent sentences on separate "counts" in an indictment in a criminal case, is inapplicable. The "agreement" in the preamble is the common denominator of the sentences imposed. The Judge said in so many words that but for his "conclusion" that the acts and statements contained in all Specifications were the "result of an agreement between these defendants, deliberately entered into in a cold and calculating manner to do and say these things" he "would have overlooked [them] or at most merely reprimanded counsel" (I R. 17).

In his dissenting opinion Judge Clark drew this conclusion from his study of the Judge's certificate (III R. 113-14):

> "In justice to the trial judge it must be pointed out that he acted upon a perfectly rational theory, namely, that of a conspiracy to obstruct justice continuing up to the very end. * * *
>
> But the other alternative, that punishment here may be considered visited on the individual acts, involves a dilemma as great. There are not only the practical difficulties of the judge's own statement that he was punishing for the conspiracy rather than for acts which might well be considered as due to the heat of the trial, and of making sense out of his distribution of penalties, except upon his own rationale of conspiracy."

Since the accusing Judge himself said in words that are unmistakable, "that he was punishing for the conspiracy rather than for acts which might well be considered as due to the heat of trial" (as paraphrased by Judge Clark above), no one is free to disregard the words or to ignore the decisional intention they express. For as it is said in *Townsend* v. *Burke*, 334 U. S. 736 (at p. 740):

> "We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence * * *.
>
> "* * * Such a result * * * is inconsistent with due process of law, and such a conviction cannot stand" (at p. 741).

B

The accusing Judge was without power under Rule 42(a) to impose punishment upon Petitioners without hearing, where the essential element of their offense as found by the Judge was an alleged agreement or conspiracy of tremendous scope or import, which obviously did not take place under the eye of the Judge and was not within his personal knowledge, thus gained.

Rule 42(a) permits departure from the procedural requirements of subdivision "b" only "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court". But even if the rule were not so specific, this Court has made it clear that the Constitution itself would require at least this minimum to justify dispensing with all its guarantees of due process of law.

Thus, in *In re Terry, supra*, the Court carefully pointed out that an essential prerequisite for departure in contempt cases from the otherwise universal proposition that a sentence rendered without affording the accused an opportunity to be heard "is not a judicial determination of his rights and is not entitled to respect in any other tribunal" (*Windsor* v. *McVeigh*, 93 U. S. 274, 277), is that the offensive conduct must be committed in the face of the Court, "under its own eye and within its hearing" (at p. 307). Again, in *Cooke* v. *United States*, *supra* (at p. 536), this Court in reversing the conviction for contempt because an adequate hearing had not been provided, stated that the justification for such an invasion for the prerequisite of due process depended upon the "assumption that the judge saw everything that went on."

In *In re Oliver, supra* (at p. 275), this Court interpreted the holding of the *Cooke* case to be "that for a court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disrupting misconduct must not only occur in the court's immediate presence, but that

the Judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct". Accordingly, the Court concluded that dispensing with notice and hearing in contempt cases was justified "*only * * * where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court.*"

The essential element, the gravamen of the contempt is the agreement as declared in the preamble. But not a single word in the entire certificate shows either that such agreement was made in open court, that the Judge had any personal knowledge of the making of such an agreement, that it was made under his eye, or that it was within the area of his observation.

Two of the Judges below (Frank, C. J. and Clark, C. J.) agreed that on a charge of conspiracy the Petitioners are entitled to a hearing. (Judge Frank's opinion, III R. 94; Judge Clark's opinion, III R. 113-14). Judge Frank recognized that with respect to conspiracy "the agreement itself, if there was one, presumably was made out of court; at any rate, it cannot conclusively be presumed that it was made in the Judge's presence; it is not entirely inconceivable that the inference of a conspiracy could be rebutted by evidence of matters not seen or heard or considered by the Judge" (III R. 94).

In *Pendergast* v. *United States*, 317 U. S. 412, the Court held that a contempt proceeding instituted because of a misrepresentation made by the alleged contemnor to a Federal Court was barred by the Statute of Limitations. The Government in that case contended that since the misrepresentation had been made in pursuance of a fraudulent, illegal conspiracy, the prosecution should be allowed to stand since the conspiracy continued in existence after the particular misrepresentation was made. But this Court held that *the conspiracy could not be charged as the offense* since it *had not been* committed in or near *the presence of the Court*, and punishment therefor could be imposed only

by way of the ordinary processes of criminal law (cf. *Doniphan* v. *Lehman*, 179 Fed. 173, 174 [C. C. D. Ind., 1902]).

In the present case, the essence of the offense charged is the alleged *agreement* among Petitioners—the equivalent of the conspiracy in the *Pendergast* case. If punishable as a contempt at all, the certificate must show that the agreement took place in the sight, hearing and actual presence of the Judge. If it did not take place in open court, it cannot be punished.

Upon what basis, then, can the convictions of the Petitioners under Rule 42(a) be justified?

POINT III

The Petitioners were denied due process of law because the accusing Judge had a substantial interest in their conviction and punishment.

The contempt certificate reveals that the accusing judge had such an interest in the conviction and punishment of the petitioners as to render the same void for lack of due process.

As has already been noted, the accusing judge wrote the following in the preamble to the specifications (1R. 17-18):

> "'By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduc' which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner, to do and say these things for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue."

If this language means anything, it must be this: That the conduct charged to the petitioners *can* be regarded merely as the manifestation of excessive zeal in the heat of trial; that the accusing judge *would* have so regarded it and "would have overlooked (it) or at most merely reprimanded counsel," but for his conclusion that it was the result of a conspiracy whose purposes included the ptitioners' impairment of his health.

There was disagreement among the Judges of the Court of Appeals as to whether the accusing judge rested his *conviction* of the petitioners on the conspiracy. There was no disagreement as to his having taken it into account in fixing their *punishment* (Judge Hand's op., III R. 9-10; Judge Frank's op., III R. 95; Judge Clark's op., III R. 114).

When the accusing judge inflicted punishment for what he believed to be a conspiracy among the petitioners to impair his health, he occupied a partisan position which rendered his decision void for lack of due process. For, as this Court said in *Tumey* v. *Ohio*, 273 U. S. 510, 534:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

And at page 532 it said:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict a defendant or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

See also:

Jordan v. *Massachusetts*, 225 U. S. 167.

The question in the *Tumey* case was whether certain statutes of Ohio in providing for the trial by the mayor of the village of one accused of violating the Prohibition Act of the state deprived the accused of due process of law and violated the 14th Amendment to the Federal Constitution,

because of the pecuniary and other interest which those statutes gave the mayor in the result of the trial. The statutes provided that the mayor should receive or retain the amount of his costs in each case over which he presided, in addition to his regular salary, as compensation for hearing such cases; but no fees or costs in such cases were paid him except by the defendant if convicted. The mayor found Tumey guilty of a statutory violation, fined him $100, and imposed $12 costs on him. In reversing this conviction on the ground that it lacked due process of law, Chief Justice Taft writing for a unanimous Court; said at page 532:

> "There are doubtless mayors who would not allow such a consideration as $12.00 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

The opinion in the *Tumey* case further shows that interests other than a judge's pecuniary interest in the result of his judgment, will void the judgment for lack of due process of law. Thus the Court held, that apart from the mayor's pecuniary interest in the result of his judgment (which was represented by the $12 costs which he imposed on Tumey), the judgment was void for lack of due process because, in his representative capacity as mayor, he had another interest in convicting defendants, i.e., that which was represented by his municipality's share in the fines he imposed on offenders (pp. 532-534).

Indeed, to support the holding that the mayor's direct pecuniary interest in convicting Tumey rendered his judgment void for lack of due process of law, Chief Jus-

tice Taft referred with obvious approval to holdings that a judge who is the object of personal abuse or assault in the course of a direct contempt in open court should not himself sit in judgment on the contemnor. Thus did Chief Justice Taft write at page 525:

> "There was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justices of the peace. In Hawkins, 2d Pleas of the Crown, Bk. 2, Ch. 8, §§ 68, 69, we find the following:
>
> 'The general rule of law certainly is that justices of the peace ought not to execute their office in their own case (citing Anonymous, 1 Salk. 396, 91 Eng. Reprint, 343); and even in cases where such proceeding seems indispensably necessary, as in being publicly assaulted or personally abused, or their authority otherwise contemned while in the execution of their duty, yet if another justice be present, his assistance should be required to punish the offender (Stra. 240).'"

The foregoing clearly appears to hold that even a judge, who solely for the vindication of the court's authority and to prevent demoralization thereof before the public, finds it necessary to and does impose instant summary punishment on one who commits a physical assault upon him in open court, is disqualified by interest from doing so. The Court is not, however, required to go that far in sustaining the position of the petitioners in this case. For the accusing judge here did not instantly punish the petitioners, for their alleged conspiracy to "impair my health," out of a felt necessity for the immediate vindication of the court's authority. Indeed, he postponed adjudication *and* punishment for as much as eight months after the notion of conspiracy came into his mind (2 D. R. 1279). Conceivably, the *necessity* for the *immediate* vindication of the court's authority may justify the *instant* summary imposition of punishment even by a judge who, like the accusing judge here "occupies two practically and seriously incon-

sistent positions, one partisan and the other judicial." It may, perhaps, be that in the context of an overriding necessity which, for the immediate vindication of the court's authority, results in instant summary punishment, the accused may be denied not only the right to notice, hearing and opportunity to defend, but the right to an impartial judge as well. But, we submit, it can only be overriding necessity than can conceivably justify denial of what this Court, in the *Tumey* case, spoke of as "the right to have an impartial judge" (p. 535). For, as was said in *Oakley* v. *Aspinwall*, 3 N. Y. 547, 549 (a case that has been cited with approval by this Court in *Amer. Constr. Co.* v. *Jacksonville, T. & K. Ry. Co.*, 148 U. S. 372, 387, and *McClaughry* v. *Deming*, 186 U. S. 49, 67):

> "The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. *Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.*" (Emphasis added.)

More recently, in *Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, this Court had occasion to say (at p. 275):

> "Certain safeguards are essential to criminal justice The court must be uncoerced, Moore v. Dempsey, 261 U. S. 86, and it must have no interest other than the pursuit of justice, Tumey v. Ohio, 273 U. S. 510."

To summarize: This Court has said that even a small pecuniary interest which might lead a judge "not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law" (*Tumey* v. *Ohio, supra*, at p. 532). Who will say that prison sentences, ranging from one to six months imposed on American lawyers by a Judge who believes them to be engaged in a conspiracy to do him personal harm are more in accord with the requirements of due process than is a hundred dollar

fine imposed by a judge confronted with the prospect of receiving twelve dollars in fees and costs upon imposing such fine..

Absent the question of a denial of due process, Rule 42(b) nevertheless provides that "if the contempt charge involves disrespect to or criticism of a judge that judge is disqualified from proceeding at the trial or hearing except with the defendant's consent."

Rule 42(b) as enacted by this Court deals with situations which are not acute enough to involve a denial of due process by virtue of any interest which the accusing judge may have in the result of the proceeding. The report of the Advisory Committee indictates that in promulgating Rule 42 (b) this Court was formalizing the policy which it had theretofore enunciated in *Cooke* v. *United States*, 267 U. S. 517. In the *Cooke* case this court evinced a concern to put the contempt proceedings "as far as possible, beyond the reach of even unjust adverse criticism" (*Toledo Newspaper Co.* v. *United States*, 237 Fed. 986, 988, cited together with *Cornish* v. *United States*, 299 Fed. 283, 285 in *Cooke* v. *United States*, supra, at p. 539).

In the *Cooke* case the attorney involved had written a letter to the Judge following the return of an unfavorable verdict. The letter made serious charges against the Trial Judge and demanded that he remove himself from further proceedings in the case.

After deciding that it was a case that required a hearing, this Court dealt with the question presented by the circumstances that the contempt charged involved accusations against the Trial Judge.

In the opinion that was written by the Chief Justice, this Court emphasized the need in a case of this character for the accusing judge "to avoid arbitrary or oppressive conclusions" (at p. 539).

This Court said that this rule of caution "is more mandatory where the contempt charged has in it the element of

personal criticism or attack upon the judge" (at p. 539). The observations which the Chief Justice made for this Court with respect to the *Cooke* case are equally applicable here:

> "The case before us is one in which the issue between the Judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows" (at p. 539).

The accusing Judge's statements in the preamble of the contempt certificate clearly warrant the conclusion that the accusing judge had "marked personal feeling", that he was concerned with an interest which made it most difficult for him to "avoid arbitrary or oppressive conclusions." This is reflected by his adjudication and punishment of these Petitioners. The adjudication was without a hearing and opportunity to defend and the punishment involved severe prison sentences with attendant consequences to the professional careers of the attorneys-petitioners.

In *Schmidt* v. *The United States*, 115 Fed. (2) 394, the Circuit Court of Appeals for the Sixth Circuit reversed the conviction of two attorneys for contempt, where it appeared that the judge who punished them was the judge against whom their clients had filed affidavits of bias, to which the attorneys had appended their certificates that the affidavits had been filed in good faith. Although the Trial Judge had struck the affidavits and certificates from the record as insufficient in law, the Court of Appeals held that the District Judge:

> "should not have been required to try the contempt cases, while he was confronted with the affidavits of bias and prejudice to which appellants had appended their certificates of good faith. This is no reflection upon the Judge nor upon any judge so confronted. Even a judge may not put aside the propensities of human nature as easily as he does his robe" (at p. 398).

In the present case there were a series of such motions antedating the commencement of the trial.

On November 4, 1948, several months before the trial began, the defendants in the *Dennis* case filed an affidavit of personal bias and prejudice (17 D. R. 12858-863). The affidavit charged Judge Medina with personal bias and prejudice against each and all of the defendants and in favor of the Government. Quoting at some length from transcripts of court proceedings the affidavit of bias and prejudice declared that "Said statements establish that he [Judge Medina] not only believes affiants to be guilty of the charges made in the indictments, but that he also believes, in the absence of both charge and evidence, that defendants 'want to wait until they get everything set' and that, when that is accomplished, they will commit acts designed to bring about the overthrow and destruction of the government of the United States by force and violence" (id. p. 12,862). The affidavit was supported by certificates of the Petitioners Sacher, Isserman and McCabe. One of the affiants was the Petitioner Dennis (id. pp. 12863-12864). On the next day Judge Medina wrote an opinion striking the affidavit of prejudice (id. pp. 12865-66).

On May 20, 1949, during the course of the trial the Petitioners moved for a mistrial. The papers in support of the motion appear in the record (17 D. R. 13321-13369). The very first ground stated in the notice of motion was "prejudicial remarks and intemperate statements of the court in the presence of the jury thereby preventing a fair trial" (id. p. 13321).

The seventh ground stated was "The attitude of the court towards defendants' counsel throughout the trial created an atmosphere which imperiled the constitutional right of the defendants to be represented by counsel as guaranteed by the Constitution, if it did not entirely deny them this right." The eighth ground declared: "The relationship the court established between the defense counsel and itself was calculated to and actually did, prejudice the jury so as to prevent the rendition of a fair verdict based

exclusively on the evidence." The ninth ground asserted "The judicial misconduct of the trial judge."

The tenth ground was based upon "The prejudice and bias of the trial judge."

Exhibit A annexed to the motion for a mistrial (id. pp. 13,323-29) gives references to the transcript record which deal wholly with incidents designed to support the charges of judicial misconduct, prejudice and bias of the trial judge.

In a motion to withdraw a juror and to declare a mistrial submitted by the Petitioners at the close of the trial (17 D. R. 13,499-13,618) one of the grounds stated in the motion (id. p. 13,521) dealt with the prejudicial misconduct of the trial judge. It was there stated:

> "The Trial Judge has, from the beginning and constantly throughout the trial, in open Court, in the presence of the jury, and when the jury was not present evidenced active bias, prejudice, partiality, temper, rudeness, impatience, sarcasm, disbelief and hostility against and towards the defendants and their counsel, and witnesses and in many essentials abandoned the role of judge to assume the functions of the prosecutor and has affected the jury thereby, in violation of those standards of fairness, decency and judicial propriety and necessary to insure a fair trial before an impartial jury thus depriving defendants of their right under the Fifth and Sixth amendments to the United States Constitution as follows."

Dealing only with the effect of the filing of a motion to disqualify the Judge in the main case, for bias and prejudice, the Court of Appeals in the *Schmidt* case said (at p. 398):

> "We do not adjudge that any unfairness permeated the trial of these cases, but to eliminate the 'chance' that such existed, the judgment should be reversed and the cases remanded for further proceedings before another judge."

Much more of a "chance" that the accusing judge was influenced by these motions and by his conviction that the

Petitioners had conspired to impair his health exists in the present case to require that the Judge's charges should be heard before another Judge.

In the *Toledo Newspaper Co.* case (which was affirmed by this Court, 247 U. S. 402, but later disapproved in *Nye* v. *U. S.*, 313 U. S. 33), Mr. Justice Holmes had this to say in his dissenting opinion (at p. 423):

> "When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessity of the case 'to insure order and decorum in their presence' as it is stated in Ex Parte Robinson, 19 Wall. 505."

The Possible Effect of these Contempt Judgments upon the Bar and the Right to the Assistance of Counsel

The expansion of the contempt power made by the decision below establishes a dangerous precedent. It threatens the right of the American people to be represented fearlessly and vigorously by counsel. As Judge Clark pointed out in his dissent below (III R. 117):

> "* * * we cannot afford to overload the sacred responsibility of providing adequate defense for all to the point where it cannot practically be fulfilled. It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the constitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job."

Is it not clear that to uphold the procedure followed in the present case must have serious consequences for the effectiveness of counsel? If the ruling of the Trial Judge is sustained, an attorney could never know whether the statements made by him during the course of a trial might

not at some future time lay the foundation for the summary infliction upon him of an enormous punishment. He would inevitably be led to make certain above all else that a Judge be favorably disposed towards him, lest he be faced —without even the opportunity of being heard—with imprisonment for something he had considered at the time it was done or said to be entirely innocent and proper.

Moreover, an attorney associated with others in the course of a trial of a number of defendants would find himself at a particular disadvantage. He could never be sure that a Judge might not conclude that he had participated in an agreement with other counsel to obsfruct justice as a result of conduct during a trial without giving him the slightest opportunity to deny such agreement. He would have to be constantly on guard in his cooperation with his co-counsel. Far from being "untrammeled" in his actions, he would necessarily be beset with doubts and suspicions as to the motives of his associates and as to how someone else might interpret those motives.

One cannot render effective assistance where he operates under a cloud of fear of future personal consequences because of what he advocates or the manner in which he does so. And this factor has its greatest importance in cases which involve issues of deep significance which arouse tremendous public excitement, where the defendants are the objects of hostility of those in power. It is here where the pressure would be greatest. Yet is here, if our institutions are to survive, that the greatest encouragement, the greatest latitude, should be given to counsel.* It is here

* The President of the United States has recently felt called upon to express grave concern: "The Bar has a notable tradition of willingness to protect the rights of the accused * * * (But) I believe that most Americans recognize how important it is to our traditions of fair trial that there be adequate representation by competent counsel. Lawyers in the past have risked the obloquy of the uninformed to protect the rights of the most degraded. Unless they continue to do so in the future, an important part of our rights will be gone." (Letter to American Bar Association dated September 1, 1951, reprinted in Bar Bulletin of New York County Lawyers Association, Vol. 9, No. 3, pp. 22, 32.)

that Judges—not counsel—must demonstrate the greatest fortitude and self-restraint. Now, perhaps more than ever before, it is vital that judicial action be calm, impersonal, consonant with due process, and procedurally discreet.*

We cannot afford to return to the practices which resulted in the disbarment of Zenger's counsel (see *Trial of John Peter Zenger*, 17 How. St. Tr. 675) and the mistreatment of lawyers who defended those accused under the Alien and Sedition Acts. The correct course in this case was that advised in Judge Clark's dissenting opinion below:

> "I know of no wiser course than to proceed deliberately according to the wisdom of the law as developed in other and perhaps less emotional times, and to approach judgment and punishment deliberately, but by that course the more surely and justly" (III. R. 117).

What the denial of due process, the enthronement of dictatorial authority in any branch of government produces is silence and sycophantism. What affirmance of the decision in this case will deter is participation by attorneys in any case in which they are likely, because of the activities of the persons whom they represent, to be faced with a hostile Judge, a Judge who will ascribe to them the motives he attributes to their clients and who will give them no opportunity for refutation. And those who do participate will be deterred from performing their duty to their clients as it should be performed, from proceeding in the forthright and fearless manner that the traditions of the Bar

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* See comments on this case in 60 Yale L. J. 1: Lawyer Troubles in Political Trials; 2 Stanford Law Review, 763: Summary Contempt: A Sword or a Shield?; 99 University of Pennsylvania Law Review 540 (note). For an expression of the concern of the English Bar, see Whitty, the *Hallinan* case, 14 Modern Law Review 89 (London, January 1951), also noting that contempt sentences against attorneys are virtually non-existent in English courts at present.

prescribe, and that the fulfillment of the Sixth Amendment demands.

CONCLUSION

The orders of conviction should be reversed.

Respectfully submitted,

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* "The Bar, if it is to continue to exist, if it would restore itself to the dignity and honor which it once possessed, must be bold in defense, and if need be, bold in aggression." Inscription on tablet below the speakers' rostrum in the auditorium of the Association of the Bar of the City of New York, credited to Hon. Samuel J. Tilden, February 1, 1870.

"The conduct of the counsel for Fries merits an abler eulogium than is in my power to make. My gratitude as an American citizen and a friend of liberty will never cease to flow to them, for they stood up against arbitrary conduct and oppression." Remarks of Mr. Rodney on behalf of the prosecution in The Impeachment Trial of Justice Samuel Chase (Report of the Trial, p. 258, Baltimore, 1805).

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No. 201

In the Supreme Court of the United States

OCTOBER TERM, 1950

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. MCCABE, ABRAHAM J. ISSERMAN, AND EUGENE DENNIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The majority (3R. 1-31)[1] concurring (3R. 91-111) and dissenting (3R. 111-117) opinions of the Court of Appeals (3R. 1-117) in the instant case

[1] We adhere to the mode of reference to the various volumes of the record which petitioners have adopted. Petitioners' appendix in the court below is designated "1"; our appendix is referred to as "2"; and the volume containing the opinion and orders of the court below is referred to as "3." The twenty-one volume joint appendix used on the appeal of petitioners' clients is referred to as "D.R."

are reported at 182 F. 2d 416. The certificate of contempt filed by the trial court appears as an appendix to the majority opinion (3R. 31-90) and is reported at 182 F. 2d 416, 430. The opinion of the Court of Appeals in the related appeal of petitioners' clients has not yet been reported.[2]

JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1950 (3R. 118), and a petition for rehearing was denied May 15, 1950 (3R. 154). On May 23, 1950, an order was entered by Mr. Justice Jackson extending the time for filing a petition for a writ of certiorari through July 14, 1950 (3R. 155). The petition was filed July 14, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioners engaged in a long series of acts of misbehavior in open court during a nine-month trial. The trial judge made it plain to petitioners that their misbehavior was noted by the court and would be punished, but he withheld formal contempt action until the verdict was entered, because to have acted sooner, in the judgment of the trial judge, would have materially contributed to appellants' purpose to so disrupt the trial as to prevent a final determination of the issues. The principal question presented is whether the trial

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[2] We have lodged nine copies of the opinion with the Clerk of this Court.

judge's admitted power to punish summarily each act of misconduct as it occurred was lost because, in the interest of frustrating petitioners' illicit purpose, the trial judge delayed formal contempt action until entry of the verdict, but before the conclusion of the case.

2. Subsidiary questions presented are:

a. Whether the validity of the concurrent sentences for specific acts of misbehavior is impaired because the Court of Appeals reversed Specification I charging as a contempt a continuing joint effort to obstruct the trial on the ground that such an offense is not punishable summarily.

b. Whether as to the various specifications which were affirmed, the certificate adequately recites the facts in conformity with Rule 42(a), F.R. Crim. P.

STATUTORY PROVISIONS AND RULE INVOLVED

Chapter 21 of Title 18, United States Code, provides:

§ 401. *Power of Court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 402. *Criminal Contempts*

* * *

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted

on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioners appeared as defense counsel in the case of *United States* v. *Dennis, et al.*, a prosecution of eleven leaders of the Communist Party for violation of the Smith Act (now 18 U.S.C. 2385). The case was called for trial on January 17, 1949, and was concluded in the trial court on October 21, 1949, approximately nine months later. Immediately after the jury returned its verdict on October 14, the trial judge filed a certificate of contempt containing forty specifications (1R. 17a-73a), and appropriate orders convicting petitioners of the various contempts specified against

each of them in the certificate.[3] The first specification was framed on the theory of a continuing joint effort by all petitioners to obstruct the trial, and all were convicted on this charge. The remaining thirty-nine specifications charged as contempts specific acts of misconduct in open court during the course of the trial, and only those petitioners who were parties to the specific misconduct charged were convicted under these specifications. Petitioner Sacher was convicted of twenty-three separate contempts and was sentenced to imprisonment for a term of six months on each contempt, the sentences to be served concurrently (1R. 16a). Petitioner Gladstein was similarly sentenced for each of eighteen contempts (1R. 13a), as was petitioner Dennis on each of five specified contempts (1R. 11a). Petitioner Crockett was sentenced to imprisonment for a term of four months on each of nine contempts, the sentences to be served concurrently (1R. 12a), as was petitioner Isserman on each of seven specified contempts (1R. 14a). Petitioner McCabe was sentenced to imprisonment for a term of thirty days on each of six specified contempts, the sentences to be served concurrently (1R. 15a).

Upon the entry of the contempt judgments, each petitioner addressed the Court protesting the judgments (1R. 86a-99a). In response to peti-

[3] The trial judge read in open court that portion of the certificate ending with specification I, and the orders which recite the specifications of which each petitioner was convicted. (R. 81a-86a).

tioner Sacher's remarks conceding "that the power rests in the Court to act summarily" but urging that as a matter of discretion petitioners should have been accorded a hearing (1R. 90a-91a), the trial judge stated (1R. 91a-92a):

> Let me say this to you, Mr. Sacher: as to these contempt adjudications, let them be notice to you and to all who may be tempted to follow your example that there is power in the judicial system of the United States under the Constitution and the laws of the United States to protect and maintain the dignity of the court and the orderly administration of justice therein.
>
> It is contemplated in the rules that the punishment should be summary. I have waited until today because it was the first time that I could act, as I have indicated in what I read to you from the certificate.

Upon appeal to the Court of Appeals, the court found the evidence not "sufficiently clear" to support Specifications XV and XVIII, which charged petitioner Sacher with deliberately attempting to deceive the court. Two of the three members of the court (Frank and Clark, J.J.) were of the view that Specification I charging a continuing joint effort to disrupt the administration of justice was not punishable summarily, and, accordingly, the conviction on that Specification was reversed. The majority of the court (A.N. Hand and Frank, J.J.) in separate opinions concluded that the evidence amply supported the convictions under the

remaining thirty-seven specifications and that the convictions were a proper exercise of the summary contempt power in conformity with Rule 42(a), Federal Rules of Criminal Procedure. Judge Clark dissented on the ground that the power to convict without a hearing for contempt in the face of the court may be exercised only at the instant of the misbehavior and only if such action is necessary to permit the further functioning of the court.

ARGUMENT

The facts, the legal issues and the related policy considerations were fully briefed by the parties in the court below and they are fully dealt with in the opinions of Judge Hand (3R. 3-31) and Judge Frank (3R. 91-111) below. In the circumstances, there is no occasion to restate here what already appears in the opinions, and we accordingly confine our argument to considerations which supplement the opinions in the court below.

1. Petitioners' effort to shift responsibility for the untoward events in the trial court by attacking the judicial probity of the trial judge has been considered by all six judges of the court below and rejected. While the bench which considered the instant case was divided on a question of procedure, there was unanimity in characterizing petitioners' conduct. Judge Clark, dissenting, referred to it as "abominable" (3R. 111). The main opinion (per A. N. Hand, J.) described petitioners' courtroom conduct as "intolerably obstructive to an orderly trial" (3R. 29), and Judge Frank

described it as "outrageous" (3R. 91). On the appeal of petitioners' clients another bench of the court (L. Hand, Swan and Chase, J.J.) also reviewed the record. That bench found that petitioners did all that they could "to make impossible an orderly and speedy dispatch of the case"; that "the record discloses a trial fought with a persistence, an ingenuity, and—we must add—with a perversity, such as we have rarely, if ever, encountered." With respect to the conduct of the trial judge, Chief Judge Hand summed up the record as follows:

> The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater selfcontrol and forbearance than it is given to most judges to possess.

In the light of the review of the lengthy record by all six judges of the court below and their unanimous conclusion concerning petitioners' conduct, it is fanciful for them to argue now that it was the trial judge, not they, who is chargeable with misconduct.[4]

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[4] Petitioners' intimation in this Court (Pet. 7) that the trial judge falsified the facts in his certificate of contempt is starkly in contrast with their failure in the trial court even to move to modify the certificate to reflect the facts consistently with petitioners' version. As an illustration of

2. Petitioners' argument, which the dissenting judge below adopted, that the summary contempt power to punish misbehavior in the presence of the court may be exercised only to remove an impending obstruction to the further functioning of the court in the trial of the case and that it may never be exercised at the conclusion of the trial simply does not square with the decided cases. Even in *Ex parte Terry*, 128 U. S. 289, upon which Rule 42(a) is based, the obstruction to the court's business was terminated and the reading of the court's opinion was completed before steps were taken summarily to punish Terry for his contempt.[5] If the theory of petitioners and the dissenting judge were sound, this Court would have been required to grant the writ of habeas corpus to Terry on the ground that the lower court lacked power to punish him summarily for misconduct which was not a pending obstruction at the time the court acted.

We have found no decision which holds that the summary contempt power, which Congress has directed shall be exercised "in conformity

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their point, petitioners refer to Specification VII (Pet. 12) and indicate that the trial judge gave permission to petitioner Isserman to address the court. They neglect, however, to point out that after an extended colloquy, the trial judge several times indicated that he desired no further argument, and that when petitioner Isserman finally subsided, his colleagues, petitioners McCabe, Sacher and Crockett took their turns at the judge (2 D.R. 1133-1142).

[5] See the detailed facts as set forth by Judge Frank (3R. 98-99) and in the report of the case in the lower court. *In re Terry*, 36 Fed. 419, 420 (C.C.D. Calif.).

to the prevailing usages at law" (18 U.S.C. 402), may be exercised only to remove a pending obstruction to the court's functioning. To the contrary, both the Federal and State courts have been unanimous in adopting the view which the court below adopted.[6] It is true that the *Terry* decision left open the question whether the summary contempt procedure could be followed "at a subsequent term, or at a subsequent day of the same term" (128 U. S. at 314). But the Court was not referring to the situation of a continuing trial, as was the case here. There, the proceeding had been completed and the reservation related to acting on a day or term subsequent to the termination of the proceeding.

The situation here is not one where the attorneys had no occasion to believe during the course of trial that their conduct was improper and then were later taken by surprise. Here, as the court's opinion emphasizes with record references (3R. 26), the trial judge made it plain to petitioners that their conduct was not acceptable and would be dealt with at the earliest possible moment. And this was done. In the opinions below, both Judges A. N. Hand and Frank agree that this was a satisfactory procedure in the context of petitioners'

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[6] In addition to the decisions cited in the court's opinion (3R. 29), see *Hallinan* v. *United States*, 182 F. 2d 880, 887 (C.A. 9); *O'Malley* v. *United States*, 128 F. 2d 676, 684 (C.A. 8), reversed on another ground, *sub nom. Pendergast* v. *United States*, 317 U. S. 412; *In re Grossman*, 109 Cal. App. 625, 631-632, 293 Pac. 683, 685-686.

deliberate effort to break up the trial. Their view is supported by Judges Learned Hand, Swan and Chase. In the opinion on the appeal of petitioners' clients, the latter bench stated:

> * * * at times he [the trial judge] warned them [petitioners] that if they persisted in conducting themselves as they had been doing, he would punish them when the trial was over. (An entirely proper action, for to commit them pending the trial would have broken it up, and to be silent might well have misled them.)

The short of the matter is that the trial judge had the power to impose summary punishment for each act of misbehavior as it occurred. He did not do so because that course of action would have permitted petitioners and their clients to achieve their objective and cause a mistrial. Instead he adopted a course which was calculated to prevent demoralization of the court's authority before the public and yet protect the trial from disruption. As five judges of the court below have concluded, that was a sensible resolution of a difficult problem, and it was one which did not in the least prejudice petitioners.

3. We submit that there is no substance to petitioners' argument (Pet. 23-26) that the reversal of Specification I, which charged a joint continuing contempt throughout the trial requires the reversal of the other specifications which charged specific acts of contempt against the various peti-

tioners. In this respect the certificate is akin to an indictment which charges a conspiracy in the first count and substantive offenses in the remaining counts. It has never been thought that the failure of the prosecution under the conspiracy charge in any manner affects the remaining counts. *Long* v. *United States*, 139 F. 2d 652, 653-654 (C.A. 10).

Perhaps in anticipation of the argument which petitioners advance, the trial judge made it abundantly clear that he intended each specification to be viewed as a separate offense. For he imposed a separate sentence for each specification and directed that they be served concurrently. In these circumstances, there is no basis for reversal on appeal unless all the sentences are invalid. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642; *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

4. Petitioners' final argument (Pet. 26-27) that the Certificate is inadequate because it does not recite the facts as Rule 42(a) requires is absurd. Each of the thirty-seven specifications which were affirmed carefully sets forth the precise facts upon which the contempt order is based. In testing the quality of petitioners' conduct, the court below had no difficulty in ascertaining the facts from the specifications in question. It certainly did not prejudice petitioners that the trial judge sought also to incorporate the entire trial record into the certificate. Whether or not it was incorporated into the certificate, the trial record would have been

before the court below and this Court. Indeed, we do not understand petitioners to urge that in assessing their conduct the appellate courts may not examine the specifications in question in the context of the entire trial record.

CONCLUSION

The extensive record is permeated with illustrations of petitioners' desperate efforts to break up the trial. In dealing with that conduct the trial judge adopted a course which was consistent with Rule 42, the decided cases and considerations of public justice. To deny a trial court sufficient flexibility of power to protect the administration of justice from petitioners' odious conduct would be to place the court at the mercy of those who respect "neither the laws enacted for the vindication of public and private rights nor the officers charged with the duty of administering them" (*Ex parte Terry*, 128 U. S. 289, 313). We respectfully submit that the petition for a writ of certiorari should be denied.

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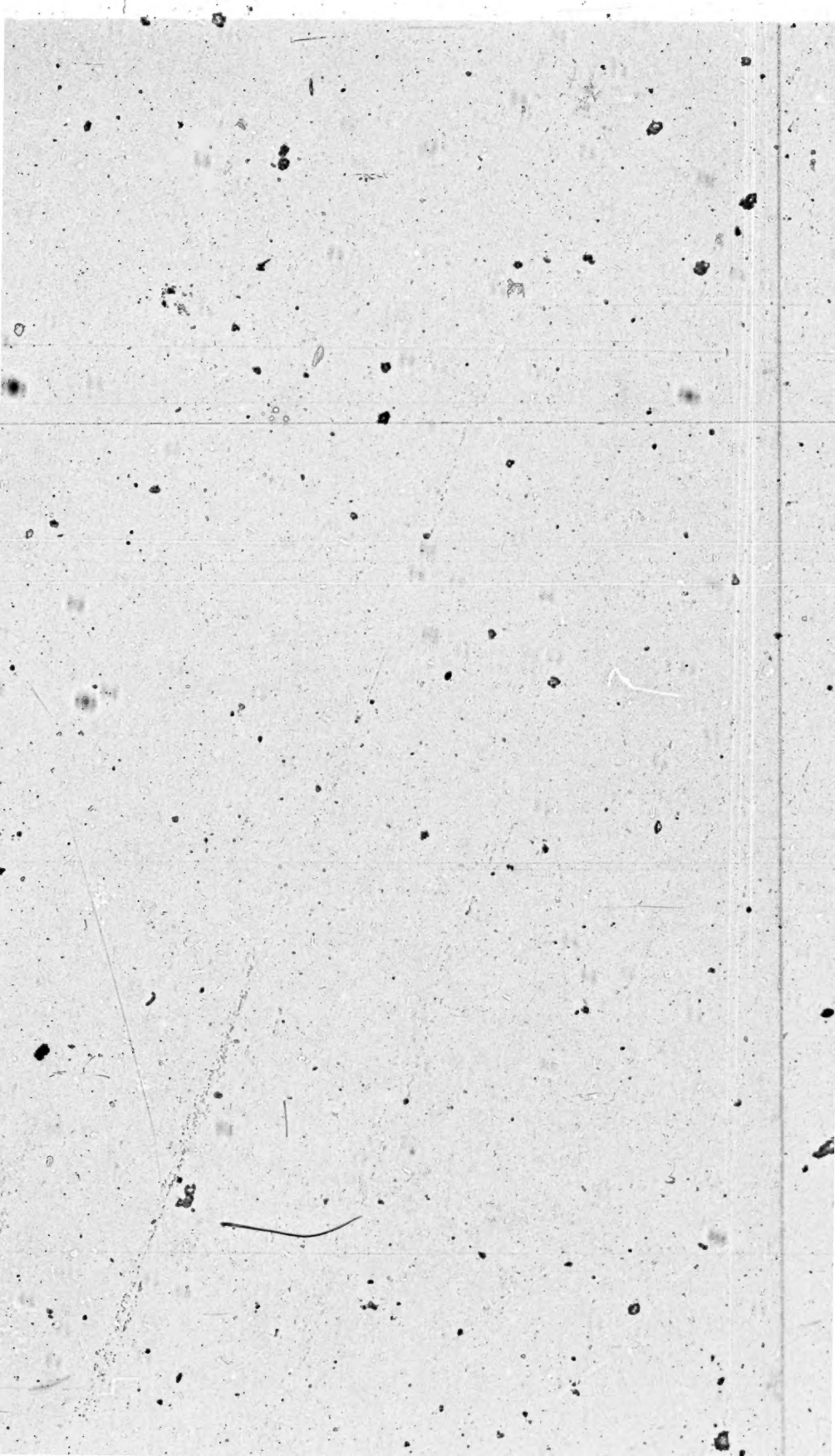

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QUESTIONS PRESENTED

1. Petitioners engaged in a long series of acts of misbehavior in open court during a nine-month trial. The trial judge made it plain to petitioners that their misbehavior was noted by the court and would be punished, but he withheld formal contempt action until the verdict was entered, because to have acted sooner, in the judgment of the trial judge, would have materially contributed to petitioners' purpose so to disrupt the trial as to prevent a final determination of the issues. The question presented, as defined by

this Court in its limited grant of the petition for certiorari, is:

Was the charge of contempt, as and when certified, one which the accusing judge was authorized under Rule 42 (a) to determine and punish himself; or was it one to be adjudged and punished under Rule 42 (b) only by a judge other than the accusing one and after notice, hearing, and opportunity to defend?

Petitioners' brief presents two other points which do not appear to be included within the above question. These points, which out of an abundance of caution are discussed in Points II and III of this brief are:

2. Whether the Specifications in the Contempt Certificate sustained by the court below are so inseparable from Specification I, which was reversed, as to invalidate the concurrent sentences imposed under the Specifications which were sustained; and

3. Whether it was a violation of the due process clause for Judge Medina to adjudicate the petitioners guilty of contempt in the presence of the court because he found, *inter alia*, that petitioners were seeking to impair his health so that the trial could not continue and otherwise to attack him personally.

STATUTORY PROVISIONS AND RULE INVOLVED

Chapter 21 of Title 18, United States Code, provides:

§ 401. *Power of Court.*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

§ 402. *Criminal Contempts.*

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so

damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allow-

ing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Petitioners appeared as defense counsel in the case of *Dennis, et al.* v. *United States,* 341 U. S. 494, a prosecution of eleven leaders of the Communist Party for violation of the Smith Act (now 18 U. S. C. 2385). The case was called for trial on January 17, 1949, and was concluded in the trial court on October 21, 1949, approximately nine months later. Immediately after the jury returned its verdict on October 14, the trial judge filed a certificate of contempt containing forty specifications (1R. 17–73), and appropriate orders

convicting petitioners of the various contempts specified against each of them in the certificate.[2]

The certificate, which was filed in conformity to Rule 42 (a), Federal Rules of Criminal Procedure, is divisible into three parts. The first two pages (1R. 17–18) consist of a "preliminary" statement explaining the necessity for the court's action and the reason why it was delayed until the close of the trial. In it Judge Medina stated that the misconduct of petitioners resulted from a deliberate plan (1) to cause delay and confusion in the trial; (2) to provoke incidents which petitioners intended would result in a mistrial; and (3) to impair his health so that the trial could not continue. The certificate recites that in the court's judgment the maintenance of the dignity of the court and the preservation of order in the courtroom left no alternative—

> than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain.

The second part of the certificate consists of Specification I (1R. 19–20), which recites that petitoners "joined in a wilful, deliberate, and

[2] The trial judge read in open court that portion of the certificate ending with specification I, and the orders which recite the specifications of which each petitioner was convicted (1R. 81–86).

concerted effort to delay and obstruct the trial * * * for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute * * *." The Specification recites thirteen categories of misbehavior in which petitioners indulged during the proceedings as the means by which petitioners sought to "effect" their plan.

The third part of the certificate consists of thirty-nine specific incidents of misconduct which, although they furnish factual support to Specification I, were also found to be severally punishable as contempts (1R. 20–73). The certificate designates which specifications were found to be contempts as to each of the various petitioners (1R. 18).

Several times during the course of the trial, Judge Medina had informed petitioners that he would not take disciplinary action against them during the trial and thus further disrupt the proceedings, but that they would "take the consequences in due time" (2R. 514) (see also 2R. 55, 57, 58, 461–462, 516, 547, 571, 607, 618–619). Many of these warnings occurred in connection with the misconduct charged in particular Contempt Specifications.[3] The court made it plain

[3] For example, Specification VII (2R. 42): "The Court: Now, if you insist, you must, of course, take whatever the

to petitioners and the public throughout the proceedings that petitioners' conduct was not acceptable and constituted misbehavior in the face of the court (see 2R. 56–57, 65–66, 85–86, 93, 100, 118, 139, 152–153, 154, 155, 177, 197, 408, 409, 426, 441–442, 447, 461–462, 473, 476–477, 514, 516–517, 531, 546, 619, 628–629, 641–643, 643–644, 653–654, 680, 702, 712, 721, 722, 733–734).

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consequences are." Specification XXII (2R. 461): "The Court: Now, Mr. Crockett, you seem on the brink of making trouble for yourself. Not now but later." Specification XXIV (1R. 49): "The Court: * * * Now you have already got a very substantial record of disobedience here. You may have an additional record now if you choose to go on. * * * Now as I said before, if you choose to pile up the record of these things against yourself, you may go on." Specification XXX (2R. 571): "The Court: That is just one more mark against you, Mr. Sacher. You would not dare do that but for what I have said as to this trial, and you may live to regret it." Specification XXXI (1R. 55): "The Court: I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous." Specification XXXII (1R. 60): "The Court: * * * I have had enough contemptuous conduct from you and I am not going to have any more. Mr. Isserman: I am not aware of any contemptuous conduct. The Court: Well, you will be aware, all right." Specification XXXVIII (1R. 71–72): "The Court: Mr. Crockett, that is one of the most contemptuous things that has occurred at this trial. Mr. Crockett: I am trying— The Court: And for that you will be brought to justice. * * * The Court: You say I seemingly do something and accuse me of deliberately evil motives here. That is something that I cannot pass over and I shall not. I now adjudge you in contempt for that."

Petitioner Sacher was convicted of twenty-three separate contempts, and was sentenced to imprisonment for a term of six months on each contempt, the sentences to be served concurrently (1R. 16). Petitioner Gladstein was similarly sentenced for each of eighteen contempts (1R. 13), as was petitioner Dennis on each of five specified contempts (1R. 11). Petitioner Crockett was sentenced to imprisonment for a term of four months on each of nine contempts, the sentences to be served concurrently (1R. 12), as was petitioner Isserman on each of seven specified contempts (1R. 14). Petitioner McCabe was sentenced to imprisonment for a term of thirty days on each of six specified contempts, the sentences to be served concurrently (1R. 15).

Upon the entry of the contempt judgments, each petitioner addressed the Court protesting the judgments (1R. 86–99). In response to petitioner Sacher's remarks conceding "that the power rests in the Court to act summarily" but urging that as a matter of discretion petitioners should have been accorded a hearing (1R. 90–91), the trial judge stated (1R. 91–92):

> Let me say this to you, Mr. Sacher: as to these contempt adjudications, let them be notice to you and to all who may be tempted to follow your example that there is power in the judicial system of the United States under the Constitution and the laws of the United States to protect and maintain the dignity of the court and

> the orderly administration of justice therein.
>
> It is contemplated in the rules that the punishment should be summary. I have waited until today because it was the first time that I could act, as I have indicated in what I read to you from the certificate.

Petitioner Crockett conceded that petitioners were aware during the trial that they were being adjudged in contempt; he said: "Long prior to today your Honor saw fit to adjudge me in contempt, which I believe was the first adjudication of contempt that had been made in the course of the trial" (1R. 95).

Upon appeal to the Court of Appeals, the court found the evidence not "sufficiently clear" to support Specifications XV and XVIII, which charged petitioner Sacher with deliberately attempting to deceive the court. Two of the three members of the court (Frank and Clark, JJ.) were of the view that Specification I charging a continuing joint effort to disrupt the administration of justice was not punishable summarily, and, accordingly, the conviction on that Specification was reversed. The majority of the court (A. N. Hand and Frank, JJ.) in separate opinions concluded that the evidence amply supported the convictions under the remaining thirty-seven specifications and that the convictions were a proper exercise of the summary contempt power in conformity with Rule 42 (a), Federal Rules

of Criminal Procedure. Judge Clark dissented on the ground that the power to convict without a hearing for contempt in the face of the court may be exercised only at the instant of the misbehavior and only if such action is necessary to permit the further functioning of the court.

SUMMARY OF ARGUMENT

I

In order to prevent a mistrial or serious interruption in the *Dennis* case, Judge Medina, after warning petitioners, refrained from punishing them for their contempts until the trial was concluded. Nothing in the language or purpose of Rule 42 (a) of the Federal Rules of Criminal Procedure precluded him from adopting such a sensible procedure. Rule 42 (a) does not require that summary punishment for contempt must be imposed at the instant the contempt occurs. On the contrary, it is clearly sufficient that the judge act as expeditiously as is practicable without breaking up the trial.

The purpose of the summary contempt power is not limited to preventing immediate disorder in the courtroom, as petitioners apparently contend. For the punishment for contempt always takes place after the event, and preserves order primarily by reason of its deterring effect upon future conduct in the same and other cases. "Demoralization of the court's authority" (*Cooke* v. *United States*, 267 U. S. 517; *In re Oliver*, 333

U. S. 257) will occur just as effectively if contemptuous conduct interferes with a court's primary responsibility of administering justice through hearing and promptly deciding cases. The power is essential to prevent the administration of justice from falling into disrepute. *Fisher* v. *Pace*, 336 U. S. 155. Since the summary contempt power rests on a bundle of reasons, and not merely upon the necessity for acting immediately to preserve order and decorum, there is no occasion to read into Rule 42 (a) a time limitation which it does not contain. Certainly, a contemnor cannot be prejudiced by permitting the judge to view the contempt in calmer perspective at the end of the trial instead of requiring him to act at the moment he is provoked. Moreover, a hearing, particularly before another judge, is not an appropriate method for determining facts which occurred within the sight and hearing of the judge.

That the summary contempt power is not limited in the manner suggested by petitioners is established by the reasoning of *Ex parte Terry*, 128 U. S. 289 (which reserved the precise question), and by the holding of every case in the State and lower Federal courts in which the point has been raised. See in particular, *Middlebrook* v. *State*, 43 Conn. 257 (1876) and *In re Cary*, 165 Minn. 203, 206 N. W. 402 (1925). Although the *Cooke* and *Oliver* cases, upon which petitioners rely, were not concerned with the present problem, the

general language employed by this Court does not warrant the narrow interpretation given it by petitioners. Indeed, the *Cooke* case significantly remarks (267 U. S. at 539):

> Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

II

Petitioners' argument that the 37 specifications on which they were convicted were dependent upon and inseparable from the finding of agreement embodied in Specification I, which was set aside, is inconsistent with the plain language of the judgments and the contempt certificate, both of which dealt with the contempts separately and imposed separate sentences therefor. Judge Medina's preliminary remarks referred both to the agreement and to the petitioners' individual acts of contempt, and are not predicated merely upon the form, as petitioners assert. In any event these remarks would not prevail over the formal adjudications. Judge Medina clearly intended each finding of contempt to stand on its own feet.

III

Judge Medina was not barred from finding petitioners guilty of contempt by reason of his belief that their scheme to disrupt the trial contemplated the impairment of his health as one

means to that end. The principle that a judge may not sit in a case in which he has a personal interest has never been thought applicable to bar a judge from protecting himself against disrespect, hostility or other forms of attack in the court room, for otherwise the orderly administration of justice could not be maintained. This is established not only by the cases but by Rule 42 of the Rules of Criminal Procedure and the statute from which it was derived, both of which except contempts in the court room from the requirement that another judge be called in when the character or conduct of the judge is attacked. The principle embodied in these judicial and legislative authorities can hardly be deemed unconstitutional.

ARGUMENT

PRELIMINARY STATEMENT

Petitioners have been convicted of a series of contempts because they wilfully and persistently denied to a district court of the United States the silence, respect, and decorum, in its presence, which every person—and certainly every attorney—is obliged to give if a court is to function free from disruption and with public confidence in the unhampered administration of justice. Their conduct, as Judge Medina concluded, was more than a deviation from the professional niceties which a court has a right to expect from its officers, as well as from litigants. It was a purposeful effort to frustrate the court, and thus,

to serve the illicit interest of their clients at the expense of the interests of public justice. It was a rejection of the duties inherent in every attorney's oath,[4] and it was a sharp departure from the conduct which the bar requires from its members.[5]

Six judges of the Court of Appeals have been unanimous in characterizing petitioners' conduct. Judge Clark, dissenting below, referred to it as "abominable" (3 R. 111); Judge A. N. Hand described it as "intolerably obstructive to an orderly trial" (3 R. 29), and Judge Frank termed it "outrageous" (3 R. 91). On the appeal of petitioners' clients another bench of the Second Circuit (L. Hand, Swan and Chase, JJ.) also reviewed the record. That bench found that petitioners did all that they could "to make impossible an orderly and speedy dispatch of the case" and "by *innuendo*, and at times openly [charged the judge] with unfairness and 'judicial misconduct'—often in most insulting language" (*United States* v. *Dennis*, 183 F. 2d 201, 225). Although petitioners sought review here of the evidentiary basis for the findings of contempt, the limitation upon the scope of the writ has barred further consideration of that question. The Government is entitled to

[4] See opinion of Mr. Justice Field, dissenting in *Ex parte Wall*, 107 U. S. 265, 303–304; *Booth* v. *Fletcher*, 101 F. 2d 676, 680–681 (C. A. D. C.), certiorari denied, 307 U. S. 628.

[5] See Canons 1, 15, 16, 18, 21, 22, 32, of the *Canons of Professional Ethics* promulgated by the American Bar Association.

assume, therefore, that petitioners' contempt has been correctly described both by Judge Medina and by the various judges of the Court of Appeals.

The issue which we believe to be presented by the question as framed by this Court is whether Judge Medina was authorized under Rule 42 (a) of the Federal Rules of Criminal Procedure to find petitioners guilty of contempt at the end of the trial rather than immediately upon the occurrence of each item of misconduct. This point is considered in Point I of this brief and of petitioners' brief. Petitioners, however, have raised two other questions. The first (Pet. Br., Point II, pp. 25–32) relates to whether the district judge's finding in Specification I, reversed by the Court of Appeals, that petitioners had deliberately agreed upon a plan to wreck the trial, was the gravamen of and inseparable from the other 37 findings of contempt sustained by the court below. This question, raised by the fifth of the Questions Presented in the petition for certiorari (p. 13), is concerned with the construction of the Contempt Certificate, not with the authority of the court under Rule 42. The second of these questions, as stated by petitioners (Br., Point III, pp. 32–44) is whether they "were denied due process of law because the accusing Judge had a substantial interest in their conviction and punishment." This point was raised by the fourth of the Questions Presented in the petition, and also does not seem to lie within the

scope of the issue framed by this Court.* The substance of the point—that Judge Medina was biased—was rejected by the Court of Appeals in *United States* v. *Dennis*, 183 F. 2d 201, 225–226, affirmed (without consideration of this point, as to which certiorari was not granted), 341 U. S. 494.

Even though we do not think these questions properly before the Court at this time, it has seemed the best course for us to meet these contentions in this brief, and they are answered in Points II and III.

I

THE POWER OF THE TRIAL JUDGE UNDER RULE 42 (A) TO PUNISH THE PETITIONERS SUMMARILY FOR CONTEMPTS COMMITTED IN HIS ACTUAL PRESENCE COULD BE EXERCISED, AS IT WAS, AT THE CONCLUSION OF THE TRIAL

As we have shown in the Statement of Facts, Judge Medina determined that petitioners were engaged in deliberate misbehavior with a view to disrupting the trial, and that if he had proceeded immediately to punish petitioners on each of the many occasions when they misbehaved in the presence of the court, such action would have aided petitioners in achieving their unlawful objective. Accordingly, the court warned peti-

* We assume that if the Court had intended to allow petitioners to argue the first five of the Questions Presented in the Petition for Certiorari, all of which petitioners have argued, it would not have limited the argument to the single question stated.

tioners from time to time that their misbehavior was contemptuous or improper or a defiance of the court's directions and that it would be acted upon at the close of the trial, when the court's action would not contribute to the disruption of the trial. In keeping with the warnings during the trial, the court proceeded summarily to punish petitioners for their misbehavior at the first appropriate opportunity, which was immediately after the verdict of the jury was returned.

This procedure was proper, for where, as here, immediate action would disrupt the proceeding or is otherwise impracticable, the court may properly stay its hand during the trial, until its action will not contribute to the contemnor's purpose. It has never been the law, as we show below, that the summary contempt power must be exercised immediately to remove an impending obstruction to the further functioning of the court. The power may also be exercised to preserve the court's authority and to prevent the administration of justice from falling into disrepute.

Unquestionably, Judge Medina could have punished summarily each instance of contempt as it occurred in the courtroom. Petitioners contend, however, that he lost his power to punish summarily under Rule 42 (a) by waiting until the end of the trial in *United States* v. *Dennis* so as to avoid the disruption of that case. Their position is that a judge may punish summarily

for contempt "committed in the actual presence of the court" only if at the instant such contempt is committed "immediate punishment is necessary to prevent demoralization of the court's authority" (Pet. Br., p. 9). We contend, to the contrary, that a Federal judge may defer summary punishment for contempt committed in his actual presence to the earliest time when such action will not disrupt the pending proceeding. We believe that our view of the power of a Federal judge to punish summarily contempts committed in his presence is consistent with the language and purposes of Rule 42 (a), is supported by *Ex parte Terry,* 128 U. S. 289, so far as that decision goes, and is clearly supported by the decisions of the lower Federal and State courts.

Rule 42 (a) of the Federal Rules of Criminal Procedure provides that "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." The Note to subdivision (a) of Rule 42 states: "This rule is substantially a restatement of existing law *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517, 534." The principle it embodies has long been recognized throughout the United States, both in Federal and State courts. Nothing in the language supports the petitioners' contention that if a judge is to impose punishment for such a contempt without notice and

hearing he must do so at the instant the contempt occurs. And, as we show (*infra*, pp. 32–43), the authorities are uniform that the doctrine set forth in the Rule is not to be so narrowly construed.

The words "summary" and "summarily" in the Rule and its title do not require immediate, extemporaneous action. Rather, it is clear, those words are used in a procedural sense, in contrast to the notice and hearing requirement of paragraph (b). Thus, the structure of the Rule shows that "summarily" is used as meaning without notice and hearing. This Court has often used the words to denote a mode of procedure. See, *e. g.*, *Fisher* v. *Pace*, 336 U. S. 155, 159–160, 163, 167; *Nye* v. *United States*, 313 U. S. 33, 52, 53, 54, 55, 57; *Ex parte Grossman*, 267 U. S. 87, 117–118.

At most, "summarily" means that the judge shall act as expeditiously as circumstances permit, which often may not be until the end of the trial. Most trials are concluded within a day or two. The fact that the trial here was of unusual duration does not detract from the judge's power to punish summarily at its conclusion for contempt during its course. Thus, although "summarily" often carries the connotation of prompt action, that condition is satisfied when the judge acts as swiftly as is practicable without impairing the administration of justice by halting the trial. As the Ninth Circuit declared

in *MacInnis* v. *United States*, 191 F. 2d 157, 160–161, petition for certiorari now pending, No. 281, Oct. Term, 1951:

> "* * * immediate penal vindication of the dignity of the court * * *", as used in *Cooke* v. *United States*, 1925, 267 U. S. 517, 536, 45 S. Ct. 390, 69 L. Ed. 767, means as speedy vindication as is practicable in the circumstances, and does not require steps which would break up a trial or frustrate the powers of the judge.
>
> We are of the opinion that while punishment should follow acts of contempt with reasonable promptness, the punishment need not follow instanter if, as in the case before us, such an imposition would endanger the due progress and termination of the trial.

See also the opinion of the Supreme Court of Minnesota in *In re Cary*, 165 Minn. 203, 206 N. W. 402, quoted at p. 38, *infra*.

Petitioners rely, not on the language of the Rule, but on what they allege is its exclusive purpose, for their contention that a contempt may be punished summarily only at the instant it is committed. For they assert that a judge can proceed summarily under Rule 42 (a) only if immediate punishment is necessary to prevent demoralization of the court's authority. And by this petitioners mean such action as will halt the contemptuous action immediately.

But "demoralization of the court's authority," a phrase taken from *Cooke* v. *United States*, 267

U. S. 517, 536, and *In re Oliver*, 333 U. S. 257, 275, will occur just as effectively if contemptuous action interferes with a court's primary responsibility of conducting trials and bringing them to a reasonably prompt conclusion. This Court recently stated in *Fisher* v. *Pace*, 336 U. S. 155, 159, that the power of courts to punish for contempt in the face of the court "is essential to preserve their authority and to prevent the administration of justice from falling into disrepute." But what surer way is there of impairing judicial authority and discrediting the judicial process than to force the court either to submit to contemptuous conduct or to risk disruption of important trials by immediately punishing such conduct?

The reasons for allowing the judge before whom a contempt is committed to punish without additional notice and hearing are not simply to preserve order in the court room, important as that may be. But even that purpose can in some circumstances be better attained if punishment is delayed until the end of the trial. Immediate punishment will not, as Judge Frank stated (3R. 96) "undo the contempt, ever a thing of the past. Therefore, the exceptional power to punish summarily cannot be founded on the ability to forestall the punished behavior. Summary punishment, then, since its effect is wholly prospective, must be justified solely by the fact that it will tend to prevent future misconduct—either (1)

in the future course of the same case or (2) in future cases." Where an object of the disorder may be to break up the trial, the prevention of similar disorders and disobedience in future cases requires that the contemnors not achieve their goal by provoking the judge into immediate retributive action. As we have suggested, the preservation of order in the court is merely one facet of protecting the primary function of the courts, the administration of justice, and plainly a basic objective of the summary contempt power is to safeguard that vital public interest.

Punishment for contempt, committed in the face of the court, without further notice or hearing, is also justified by the fact that when the judge has seen and heard what happens, there is no occasion for further trial. See *Matter of Douglas* v. *Adel,* 269 N. Y. 144, 146. Indeed, to require such a matter to be tried before another judge, with the original judge merely one of the witnesses as to what occurred, would not only impair judicial dignity but, more importantly, deprive a judge's orders of much of their effectiveness. For, obviously, his authority would be lessened if proof of disrespect for the court depended upon the taking of testimony of the judge, interested parties, and other persons in the courtroom, as to whether an attorney had shouted, sneered, or emphasized an insulting word. As stated in *Fisher* v. *Pace,* 336 U. S. at 161:

> In a case of this type the transcript of the record cannot convey to us the complete

> picture of the courtroom scene. It does not depict such elements of misbehavior as expression, manner of speaking, bearing, and attitude of the petitioner. Reliance must be placed upon the fairness and objectivity of the presiding judge.

In the instant case, Judge Medina saw and heard the conduct which he held to constitute contempt. That such misconduct often did not appear on the face of the record was recognized by the Judge, who stated that he (2 R. 85–86) "observed in the conduct of counsel before me here, sneering, snickering, obvious indications of one to another 'Get up, it is your turn now, go at it next, keep this thing going,' and so on." Petitioners contend that they could be punished for contempt at the end of the *Dennis* trial only after a hearing before another judge. In such a hearing, the trial transcript would undoubtedly be introduced in evidence. It would be necessary for Judge Medina to testify as to the attitude, tone and gestures of the petitioners, and the petitioners would seek to cross-examine him. The petitioners would testify as to their motives and as to the attitudes and tones of the trial judge which they allege indicated bias on his part. Spectators, including members of the jury, of the acts constituting the alleged contempts could be called as witnesses.

Such a spectacle would indeed produce "demoralization of the court's authority." We venture to say that a Federal judge faced with such

an experience, when confronted with contempt committed in his actual presence, will either punish summarily for contempt as it occurs, without regard to the effect of such action upon the pending trial, or he will let the contempts go unpunished. Such a result must follow if, as petitioners contend, Judge Medina could proceed under Rule 42 (a) solely for the purpose of preventing further and immediate disruption of the court's proceedings.

We think that the power to punish summarily for contempts in the presence of the court rests on this bundle of reasons, and not merely upon the necessity for immediate action which petitioners assert to be its exclusive object. And since the power has this multifold basis, it would not be proper to read into it, or into the Rule which embodies it, a time limitation which it does not contain, but upon which petitioners insist. On the contrary, the absence of any such limitation in the Rule—after the point had been raised specifically before this Court in the leading case of *Ex parte Terry*, 128 U. S. 289—is strong evidence that the Rule read literally embodies the historic practice and that its effectiveness should not be diminished by a restrictive misinterpretation.

In the instant case, Judge Medina's judicial function at the time the contempts herein occurred was to conduct the trial in *United States* v. *Dennis*, involving charges of violation of the

Smith Act. That trial was one of the longest in American judicial history. From January 17 to March 1, 1949, the proceedings were devoted to the defendants' challenge of the entire jury system as administered in the Southern District of New York. After a series of motions by the defendants, the process of selecting a jury took from March 8 to March 17. The presentation of evidence began on March 23 and was completed on September 23, 1949. During the trial the defendants themselves and the petitioners as their counsel bombarded the trial judge with a variety of affidavits of bias and motions for mistrial, and also subjected him to every variety of contemptuous conduct. During the course of the trial, the defendant Gates was punished summarily for contempt of court in refusing to answer pertinent questions, and the defendants Hall, Winston, and Green were punished summarily for contempt of court in the form of disorderly conduct in the courtroom (1 R. 51; 2 R. 511–512, 543). These contempt convictions were upheld in *United States* v. *Gates,* 176 F. 2d 78 (C. A. 2); *United States* v. *Hall & Winston,* 176 F. 2d 163 (C. A. 2), certiorari denied, 338 U. S. 851; and *United States* v. *Green,* 176 F. 2d 169 (C. A. 2), certiorari denied, 338 U. S. 851.

It was in this unparalled context that the trial judge was confronted with the repeated contempts committed by the petitioners as counsel for the defendants in the *Dennis* case. It is

true that as each such contempt occurred, the trial judge could have proceeded, without notice and hearing to adjudicate the particular petitioner in contempt and to impose punishment. But while it was feasible without halting the trial for the trial judge to commit Gates, Green, Hall and Winston to jail for contempt while ordering that they be produced in court each day, no such procedure could be followed with respect to their lawyers, these petitioners. The imposition of punishment of a term of imprisonment to be served without delay could only have had one of two consequences: either the immediate serving of such sentence would have deprived some of the defendants in the *Dennis* case of counsel, thereby precipitating a mistrial at least as to such defendants, or, in the event of an appeal by the petitioner adjudged in contempt, he could plausibly assert that he must withdraw from the prolonged trial in order to prepare his appeal. As Judge Medina found (3 R. 32):

> * * * There was, accordingly, no alternative than to give the repeated warnings which from time to time I gave, and to postpone the impositions of the sentence until the close of the case. To have done otherwise would inevitably have broken up the trial and thus served the ends which these defendants tried so hard to attain. * * *

It would have been possible for the trial judge to have proceeded immediately under Rule 42 (a)

to find that each contempt had occurred, and to have imposed a term of imprisonment as punishment therefor, but to have suspended the execution of sentence until the completion of the trial. This was the procedure followed in *Hallinan* v. *United States*, 182 F. 2d 880 (C. A. 9), certiorari denied, 341 U. S. 952, pending on petition for rehearing as No. 300, October Term, 1950. Such a sentence would be an appealable order even though execution was deferred. *Berman* v. *United States*, 302 U. S. 211, 212. However, as Judge Frank pointed out (3 R. 102):

> Had the judge, in each instance, cited and sentenced immediately—although deferring execution—he would have been obliged to stop this trial more than thirty times, in order to prepare, pursuant to Rule 42 (a) written orders specifying, in each instance, the particular contempt. Moreover, in each such instance, the sentenced lawyer would doubtless immediately have appealed, and would have had the right to argue the appeal *pro se*. The trial judge would then have had to adjourn the trial at least thirty times to allow the lawyers to prepare and argue those appeals.

The trial judge in this case could also have summarily adjudicated petitioners in contempt as the contempts occurred and deferred imposition of sentence until the end of the *Dennis* trial, again for the purpose of avoiding its disruption; this was the course followed in *MacInnis* v. *United*

States, 191 F. 2d 157 (C. A. 9), now pending on certiorari, No. 281. This is in substance what he did as to a number of the specifications of contempt. (Nos. XXXVIII, XXXVII, XXXVI, XXXIV, XXXII, XXXI, XXV, 1 R. 71–72, 69, 68, 66, 60–61, 55, 50.)[7] In any event the difference between this procedure and that followed by Judge Medina is insubstantial. It is certainly not great enough to be read into the Rule as a decisive distinction.

It is plain that persons who have committed contempt can not be said to derive any advantage from the *Hallinan* or *MacInnis* procedures as opposed to the course of action followed by Judge Medina. One of the greatest dangers in the power to punish summarily for contempt is that a judge in anger will take action which he would not have taken in a calmer moment. Persons charged with contempt have no rational basis for objection because the judge defers both his adjudication as to whether a contempt has been committed and, if so, the imposition of punishment, until he has had an opportunity to calm down and reflect and to view the conduct in question in the context of the whole trial.[8]

[7] *E. g.* Specification XXXVIII, 1 R. 72: "I now adjudge you in contempt for that." Specification XXXIV, 1 R. 66: "again you have become contemptuous."

[8] See the opinion of Judge Frank (3R. 102–103):

> This argument puts a premium on hasty action. It means that the judge may act summarily only when he is

That is what Judge Medina actually did. In the *Hallinan* case, the trial judge proceeded under Rule 42 (a) to impose punishment for contempt at 9:30 a. m. on the day following the last of the conduct specified as contempt in his certificate, but suspended the sentence until the close of the trial. Under petitioner's view, this course of action presumably would be more proper than that followed by Judge Medina, as would also the course of events in *MacInnis* where the contempt occurred on February 1, the trial judge informed MacInnis on February 2 that he would file a certificate under Rule 42 but would defer punishment until the end of the trial, the certificate of contempt was signed on February 28, and the sentence was pronounced on April 4.

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least likely to be poised and temperate, that only then may he act without a hearing. Why such instant action is fairness or due process—adequately protective of the accused—and postponed action is not, remains unexplained by proponents of this contention. Curiously enough, those who (1) argue that such instant action is an indispensable condition of summary punishment also (2) counsel (and wisely) that the use of the summary power be narrowly circumscribed, for fear that the trial judge, in using it, may do so in haste, spurred to vindictiveness by the anger of the moment. I find it difficult to reconcile those two contentions: The first insists that summary punishment is not valid unless hasty. The second points to the potential danger of haste.

There is such danger. Judges, being human, may, on occasions, respond excessively to slight provocations, if they act impulsively. Where, as here, the judge waited and reflected before he acted, there is considerable assurance that impulsiveness could not have affected him.

The problem confronting Judge Medina in the *Dennis* case, like that of Judge Harris in conducting the *Bridges* trial out of which the *Hallinan* and *MacInnis* contempt cases arise, was to deal with the persistent contemptuous conduct of defendants' counsel in such a way as to avoid disruption of the main proceeding. Judge Medina dealt with the problem by repeatedly warning counsel of the character of their conduct and by postponing both the adjudication of contempt and the imposition of sentence until the end of the *Dennis* trial. The petitioners do not even suggest that they were injured by the deferment of action under Rule 42 (a), while it is clear that such deferment, by enabling the *Dennis* trial to continue to its conclusion, served "to prevent the administration of justice from falling into disrepute" (*Fisher* v. *Pace*, 336 U. S. 155, 159).

Petitioners have not cited a single decision of any American court holding that a judge loses his power to punish summarily for contempt committed in his actual presence by waiting to the end of the proceeding in which the contempt occurred. The leading decision of this Court in *Ex parte Terry*, 128 U. S. 289, refutes any such contention. In that case, the facts were that while the court was reading an opinion in open court, Terry assaulted a marshal within the sight and hearing of the court and then left the scene. "As soon as the disturbance had ceased, Justice Field proceeded with the reading of the opinion,

after which orders were made by the court adjudging Mr. and Mrs. Terry guilty of contempt, and directing their imprisonment as a punishment therefor." *In re Terry,* 36 Fed. 419, 420 (C. C. D. Calif.)[9] That is, on the same day, the Circuit Court, in Terry's absence and without notice to him, adjudged him guilty of contempt. In this Court, Terry urged in his brief substantially the same argument as petitioners now make. He argued (128 U. S. at 293):

> We do not deny that it was within the power of the court *instantly,* upon the commission, in its presence, of the alleged contempt, and the offender continuing to be present, to adjudge the offending party guilty of contempt, and to order imprisonment.
>
> But here the record discloses, not only that the petitioner was *not instantly proceeded against,* but that he was allowed to depart from the court, and was not again brought before it in such a way as to compel him to take notice of all orders and steps in the totally separate and distinct proceedings in the contempt case.

That argument was rejected by this Court as follows (at p. 311):

> * * * Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence

[9] The facts recited in the opinion of the Supreme Court are not as detailed as they are in the report of the case in the lower court.

> of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred, to immediate punishment.

It is true that the last paragraph in the *Terry* opinion (p. 314) reserves the question whether "that procedure could be followed 'at a subsequent term, or at a subsequent day of the same term.'" (See *Pendergast* v. *United States*, 317 U. S. 412, 419.) But the reasoning of *Ex parte Terry* is squarely opposed to the petitioners' basic contention that contempt may be punished summarily only at the instant such contempt occurs and then only to prevent further and immediate disruption of the judicial process.

The crux of the *Terry* case is that Terry was not punished summarily as a preventive measure, for he had left the courtroom and the Circuit Court had resumed its business. The sole purpose and effect of the Circuit Court's contempt action was to impose punishment as such upon Terry in order to demonstrate that disorderly conduct in the courtroom would not be tolerated. It was clearly not a situation in which "*immediate* punishment is necessary to prevent 'demoralization of the court's authority'" *in the particular case,* which is the test upon which petitioners' argument rests.

This court has not had occasion since the *Terry* case to consider the present problem, for con-

tempts of this sort are fortunately rare. "But the state and lower federal courts have uniformly rejected the petitioners' thesis that the power to punish summarily for contempt must be exercised instantly upon the occurrence of the attempt or not at all. Thus, *Middlebrook* v. *State,* 43 Conn. 257, upon which this Court relied in *Ex parte Terry* (128 U. S. at 312), involved the plaintiff in a civil suit who assaulted defense counsel in the course of his argument and then fled. The court issued process for his apprehension, but his presence was not secured. Seventeen days after the contempt—when it was clear that the contemnor would not appear before the court—the court entered a contempt order sentencing him to imprisonment and to pay a fine. On appeal it was argued, *inter alia,* that the delay of seventeen days defeated the jurisdiction of the court to impose punishment summarily (43 Conn. at p. 264), but the court rejected the argument, as follows (43 Conn. at pp. 268–269):

> The offense was intentionally committed in the presence of the court. When the first blow was struck, that instant the contempt was complete, and jurisdiction attached. It did not depend upon the arrest of the offender, nor upon his being in actual custody, nor even upon his remaining in the presence of the court. When the offense was committed he was in the presence, and, constructively at least, in the power of the court. He may by flight es-

> cape merited punishment; but that cannot otherwise affect the right or the power of the court. * * * The judicial eye witnessed the act, the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment.
>
> It will hardly be denied that the court might have done that the instant the offense was committed and before the plaintiff had left the court room. We *think it is equally clear that the judge was not bound to do it at once, but might do it within any reasonable time before the term closed.* The delay was manifestly for the plaintiff's benefit and in no sense to his prejudice, the time being improved in fruitless attempts to secure his presence in court. It seems reasonably clear that he has no just grounds for complaining of the delay. [Italics supplied.]

Subsequently, in 1913, the Court of Appeals for the Ninth Circuit rejected the argument which petitioners make in this case. In *In re Maury*, 205 Fed. 626, the facts were that in selecting a jury and in the opening statement to the jury, counsel made statements disrespectful to the jury. The court admonished counsel on the second occasion and the trial of the case continued. On the following afternoon after the case had been submitted to the jury, the court entered its summary contempt order. The Court of Appeals

rejected the argument that the trial judge erred in waiting until the next day to impose the contempt judgment, stating (205 Fed. at p. 632):

> We are of opinion that the rule laid down in the case of Terry is entirely applicable to the case before this court. Obviously there can be no distinction between delaying until later in the same day, and delaying until the next day, before making an order adjudging an offender guilty of contempt of court; jurisdiction of the person of the offender having attached instantly upon the contempt being committed in the presence of the court." [10]

In 1925, the doctrine of the *Maury* and *Middlebrook* cases was adopted by the Supreme Court of Minnesota in an opinion which, we submit, furnishes a convincing rationale for the view which we take. *In re Cary,* 165 Minn. 203, 206 N. W. 402. In that case, defense counsel committed acts of contempt during the course of a criminal trial. After the case was submitted to the jury, the court imposed sentence for the contempts. On appeal, he contended, as do peti-

[10] The fact that Maury was given an opportunity to argue to the court before he was adjudged in contempt does not aid petitioners. If, as their position contemplates, a contemnor must be accorded notice and a hearing when immediate punishment is not imposed to remove a present obstruction, they can draw no comfort from the *Maury* decision. For Maury had neither notice nor a hearing in the sense that he was afforded an opportunity to adduce evidence, and clearly there was no pending obstruction to the court's business when he was adjudged in contempt.

tioners, that direct contempts may be punished summarily only at the time they are committed, and that the court lost jurisdiction by waiting until the jury had retired before taking action. In rejecting the argument the Supreme Court of Minnesota stated (165 Minn. at pp. 204–205, 206 N. W. at pp. 402–403):

> * * * A court may, and usually does, impose punishment for a direct contempt at the time the offense is committed, but it does not follow that jurisdiction is lost by waiting for a more fitting or convenient time.
>
> *We know of no law or rule requiring the court to suspend a trial for the purpose of passing judgment on a contemner and making the necessary record thereof. Where a defendant is on trial for a grave crime, it might result in serious prejudice to him if his attorney were to be adjudged guilty of contempt and subjected to punishment therefor in the midst of the trial.* While the court may punish a direct contempt instanter, yet, if of opinion that imposing punishment at that time would be unwise, or that prejudice to some of the parties before the court might ensue therefrom, it may defer action in the interest of justice and fairness, and does not lose jurisdiction by doing so.
>
> Of course the power to punish as for a direct contempt must be exercised promptly, if exercised at all; but the time within which it must be exercised is not

> well defined, and depends in a large degree upon the facts and circumstances of the particular case. In the present case the power was exercised as soon as the jury had retired and before the verdict was returned; and *we are clearly of opinion that jurisdiction to exercise it would continue at least until the trial was fully completed.* * * * [Italics supplied.]

More recently, the Court of Appeals for the Ninth Circuit came to the same conclusion in the *Hallinan* and *MacInnis* contempt cases, now pending before this Court. See pp. 29–32, *supra*. It should also be noted that in *United States* v. *Dennis*, 183 F. 2d 201, 225, a panel consisting of the three judges of the Second Circuit not participating in the instant case (L. Hand, Swan and Chase, JJ.) also expressed their approval of Judge Medina's course of action, as follows:

> * * * at times he [the trial judge] warned them [petitioners] that if they persisted in conducting themselves as they had been doing, he would punish them when the trial was over. (*An entirely proper action*, for to commit them pending the trial would have broken it up, and to be silent might well have misled them.) [Italics supplied.]

The same position was taken in *In re Grossman*, 109 Cal. App. 625, 631–632, 293 Pac. 683, 685–686; *In re Willis*, 94 Wash. 180, 184–185, 162 Pac. 38, 39–40; cf. *Albano* v. *Commonwealth*, 315 Mass. 531, 532–535, 53 N. E. 2d 690, 691–692.

Within the past decade, the Court of Appeals for the Eighth Circuit has adopted the rule of the *Maury* and *Cary* cases, stating that jurisdiction to punish for direct contempt continues until the trial of the suit is terminated. *O'Malley* v. *United States,* 128 F. 2d 676, 684, reversed on another ground *sub nom. Pendergast* v. *United States,* 317 U. S. 412.[11] Other courts have sanctioned summary imposition of sentence for direct contempt at a time other than immediately at the time of the offense without expressly discussing the question. *White* v. *George,* 195 Ga. 465, 24 S. E. 2d, 787; *Curran* v. *Superior Court,* 72 Cal. App. 258, 236 Pac. 975.

In brief, the decisions of every Federal and State court which has considered the problem[12]

[11] The Court of Appeals regarded the case as one involving direct contempt and, hence, invoked the rule of the *Maury* and *Cary* cases. The Supreme Court, however, regarded the case as one of indirect contempt which was subject to the statute of limitations. It was in meeting the Government's argument based, in part, on the *Maury* and *Cary* cases, that the Supreme Court pointed out that the question whether summary punishment for direct contempt could be imposed "at a subsequent term, or at a subsequent day of the same term" was a "problem peculiar to direct contempts in the face of the court," which had no relevancy to the problem of the statute of limitations. 317 U. S. at p. 419.

[12] In the sole case which petitioners cite to the contrary, *Gridley* v. *United States,* 44 F. 2d 716 (C. A. 6), the trial judge, after the end of the trial, proceeded upon notice and hearing to punish for a contempt committed in the actual presence of the court during the trial. The question of whether by delaying contempt action until the end of the trial the court lost the power to proceed summarily under Rule 42 (a) was not litigated.

are opposed to petitioners' fundamental contention that the power to punish summarily for contempt must be exercised instantly upon the occurrence of the attempt and solely to prevent further and immediate "demoralization of the court's authority," or not at all.

Petitioners rely heavily upon language from this Court's opinions in *Cooke* v. *United States*, 267 U. S. 517, and *In re Oliver*, 333 U. S. 257. It is sufficient to note that in neither of those cases was the alleged finding of contempt based solely upon conduct of the defendant in the actual presence of the court.[13] The language from those opinions upon which petitioners rely does indeed emphasize that the power to punish summarily for contempt can be applied only to such conduct in the actual presence of the judge as creates "an open threat to * * * orderly procedure." And it is equally true, as suggested in those opinions, that such conduct must normally be "instantly suppressed and punished" or "demoralization of the court's authority will follow." However, neither of those cases was concerned with the present problem of whether a court, after warning the persons engaged in contemptuous conduct, could defer proceeding under Rule 42 (a) to a time which would not disrupt the pending trial. Moreover, for reasons already stated (*supra*, pp.

[13] In the *Oliver* case, the Michigan judge was relying in part upon testimony given by others in the defendant's absence. 333 U. S. at 277.

22–24), the generalization as to "demoralizing the court's authority," is broad enough to include the present situation. That the court in the *Cooke* case would have agreed with the decision below is suggested by the statement that (267 U. S. at 539)

> * * * Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

The whole body of American decisions stands for the proposition that the power to punish summarily for contempt committed in the actual presence of the judge may be used to punish for a completed act of contempt where there is no likelihood of its early recurrence. In such cases as *Terry* and *Middlebrook,* there was no need for summary action to prevent repetition of the contemptuous conduct. What was needed in those cases, and what occurred, was punishment as promptly as was practicable, imposed without prior notice and opportunity for hearing. In the instant case, the trial judge summarily punished the petitioners as soon as he could do so without disrupting the Dennis trial. By such deferred action, he maintained the effective administration of criminal justice in the Southern District of New York. Acting when he did, it is probably that he acted with greater calm than any judge could have maintained at the instant

the contempts occurred. And he was able to view the contempts in the context of the whole trial.

We think it plain that the sensible procedure which Judge Medina adopted not only was warranted by the terms of Rule 42 (a) but was required if the purpose of the Rule was to be achieved.

II

SPECIFICATION I CHARGING AS A CONTEMPT A CONTINUING JOINT EFFORT TO OBSTRUCT THE TRIAL IS A SEPARATE OFFENSE FROM THE SPECIFIC ACTS OF MISCONDUCT CHARGED IN THE OTHER SPECIFICATIONS, AND ITS INVALIDITY, OR THE PRELIMINARY STATEMENT OF THE CERTIFICATE, DOES NOT AFFECT THE VALIDITY OF THE OTHER SPECIFICATIONS

Petitioners argue that the first specification of contempt, charging a joint concert of action throughout the trial by all petitioners to obstruct the administration of justice, which was set aside by the court of appeals, must be read into the remaining thirty-nine specifications relating to specific acts of contempt by individual petitioners. Accordingly, they contend that all the remaining specifications must fall with it. They rely on Judge Medina's preliminary statement as support for their argument that the certificate must be read as simply a conviction for conspiracy. The certificate as well as the orders adjudging petitioners guilty of contempts demonstrate that there is no substantial basis for this position.

After the preliminary remarks, the certificate states that petitioners are adjudged "guilty of

the *several criminal contempts*[14] described below" (1R. 18). Then follows each petitioner's name with a list of the specifications of which he is adjudged guilty, including not only Specification I but also certain of the remaining 39 specifications charging specific acts of misconduct during the trial.

Each order (1R. 11–16) adjudges the particular petitioner concerned "guilty of *contempts* of court as specified in the accompanying certificate," listing the specifications which relate those contempts. It then sentences him "on *each contempt*," the "sentences [to] be served concurrently" (1R. 11–16).

Thus, it is evident that the judge found each petitioner guilty of several contempts, including not only the concerted action charged in Specification I but also the specific acts of misconduct charged in the other specifications. Judge Medina proceeded on two theories, one applicable to the first specification and the other applicable to the remaining specifications. Not only was he of the view that petitioners' specific acts of misconduct were contemptuous, but also that their conduct resulted from an agreement. The latter he thought was a separate and distinct contempt, deserving separate punishment. This appears not only from the fact that he charged separate contempts, but also because he imposed separate punishment for the offenses described in Specifications II–XL.

[14] All italics herein are supplied.

It would be a strained construction to hold that these deliberately formal adjudications were modified by the preliminary statement in the certificate. "A judgment 'does not reside in its recitals, but in the mandatory portions.'" See *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 928 (C. A. 2), certiorari denied, 333 U. S. 873; *Eckerson* v. *Tanney*, 235 Fed. 415, 418 (S. D. N. Y.), affirmed, 243 Fed. 1007 (C. A. 2). Here, the meaning of the adjudications is unambiguous.

Petitioners rely principally on the second paragraph in the preliminary statement (1R. 17–18), in which Judge Medina concluded that petitioners' acts "were the result of an agreement between these defendants [petitioners], deliberately entered into in a cold and calculating manner, * * * for the purpose of: (1) causing such delay and confusion as to make it impossible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) impairing my health so that the trial could not continue." This preliminary finding of agreement was reflected in Specification I of the Contempt Certificate.

In the third paragraph of the preliminary statement, however, Judge Medina found that "the acts, statements and conduct of *each* of the defendants, *hereinafter specified*, constituted a deliberate and wilful attack upon the administration of justice, an attempt to sabotage the functioning of the federal judicial system, and mis-

conduct of so grave a character as to make the imposition of fines a futile gesture and a wholly insufficient punishment." [Italics supplied]. This statement clearly applied to the conduct of each of the individual petitioners separately, as defined in the last 39 specifications. It was not predicated on the agreement or conspiracy charged in Specification I and described in the preceding sentence. The finding as to the petitioners' wilfulness obviously rested upon the conduct of each of them in open court, just as did similar findings as to the wilfulness of the contempt in *Ex parte Terry*, 128 U. S. 289, 298,[15] and in the order upheld in *Fisher* v. *Pace*, 336 U. S. 155.[16]

The preliminary statement read as a whole thus does not support petitioners' contention that all of the specifications of contempt rested on the finding of agreement or conspiracy, but the contrary. Certainly, clear and unambiguous language would be necessary to overcome the plain manifestation in the formal judgments and the remainder of the Contempt Certificate that each

[15] The order in the *Terry* case, which was based upon contempt occurring in the presence of the court, recited that Terry assaulted the United States marshal "with intent to obstruct the administration of justice, and to resist such United States marshal and the execution of the said order" (128 U. S. at 298).

[16] The order upheld in *Fisher* v. *Pace* stated that Fisher "wilfully interrupt[ed] the business of the Court and impair[ed] respect to its authority." *Ex parte Fisher*, 206 S. W. 2d 1000, 1006.

specification contained an independent finding of guilt for which an independent, though concurrent, punishment was imposed. We submit that there is no warrant for construing the preliminary statement as modifying the judge's formal adjudications that petitioners were guilty of specific contemptuous acts—particularly since Specifications II–XL as isolated events were clearly contemptuous.

The Certificate is analogous to an indictment where a defendant is charged in one count with conspiracy and in others with substantive offenses. Convictions on the substantive counts do not fall if a conviction on the conspiracy count is reversed. Cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641–644; *Long* v. *United States,* 139 F. 2d 652, 653–654 (C. A. 10). And a conviction must be affirmed if any one of a number of concurrent sentences was validly imposed. *Hirabayashi* v. *United States,* 320 U. S. 81, 85. The judge may well have had these rules in mind when he imposed the equal concurrent sentences. But this would hardly demonstrate that he considered the last 39 charges as inextricably interwoven with and inseparable from the first. On the contrary, it would demonstrate that he wished each to stand upon its own independent foundation.

Petitioners' argument comes down to the contention that if, as has been held in this case, they cannot be convicted in this proceeding on the

charge of agreement to commit contempts, then the petitioners cannot be convicted of any of the substantive offenses committed by them during the lengthy trial of their clients. No such contention could be made if Specification No. 1, charging joint action, had been omitted from the Certificate. It is clear that each of the 39 specifications of contempt charges a separate and distinct offense, each independent of all the others. The theory that each and all of them must fail with the specification containing what amounts to a charge of conspiracy does not seem to be based on any recognized principle of law. Petitioners cannot escape punishment for their offenses on the basis of any such unsound theory.

Judge Medina clearly indicated his intention to convict petitioners for their specific acts of misbehavior, as well as for their concerted action, and to impose separate sentences for each offense. Accordingly, the invalidity of Specification I does not affect the validity of the other convictions.

III

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS BY THE FACT THAT JUDGE MEDINA HIMSELF DETERMINED THAT THEY WERE IN CONTEMPT

Petitioners argue that Judge Medina "had such an interest in the conviction and punishment of the petitioners as to render the same void for lack of due process" (Br. p. 32). The asserted interest is said to flow from his statement (1 R. 18)

that petitioners' scheme to prevent continuance of the trial contemplated the impairment of his health as a means to that end.[17]

The basic principle that a person may not judge a case in which he has an interest (*Tumey v. Ohio*, 273 U. S. 510) has never been deemed applicable to contempt committed in the presence of the court, even when the contempt consisted—as it often did—of a manifestation of disrespect for or hostility to the judge personally. The reason is that in the court room the official and personal capacities of the judge cannot be separated, and that preservation of the orderly administration of justice requires that respect for the court must be maintained. On petitioners' theory, a judge would have no power to punish an attorney, party, or other person who climbed over the bench and attacked him with his fists or a blackjack; for in that case the assault would be upon the judge personally, would doubtless be designed to impair his health, and would almost certainly provoke his personal ire. Nor could a judge punish a person who repeatedly insulted him in the courtroom. The contention that a judge so provoked could not punish the assailant for contempt but must transfer the matter to another judge embodies a novel and startling doctrine.

[17] To the extent that petitioners' object was to break up the trial, as Judge Medina found (1 R. 18), it can be assumed that the same tactics would have been employed whatever judge was sitting, and that any effort to impair the judge's health so that the trial could not continue was a strategic move rather than a personal attack upon the judge.

Cooke v. *United States*, 267 U. S. 517, upon which petitioners rely, stands for no such proposition. On the contrary, the *Cooke* case recognizes that the judge could punish "disrespect to the court, when occurring in open court" (267 U. S. at 534), which it also characterized as a "flagrant defiance of the person and presence of the judge" (p. 536). The contempt in the *Cooke* case was found not to have occurred in open court. This Court held that it was preferable for such cases to be submitted to another judge where possible (p. 539), but the opinion shows plainly that this was not regarded as a matter of constitutional right (*ibid*). And other cases in which disrespect for the judge was found by him to be contemptuous, show that the constitutional argument has no substance. Cf. *Ex parte Terry*, 128 U. S. 289; *Fisher* v. *Pace*, 336 U. S. 155; *Fleming* v. *United States*, 279 Fed. 613 (C. A. 9), petition for a writ of certiorari dismissed on motion of counsel for petitioner, 260 U. S. 752; *United States* v. *Landes*, 97 F. 2d 378 (C. A. 2); *Owens* v. *Dancy*, 36 F. 2d 882 (C. A. 10).[18]

The *Cooke* case is also significant because of its anticipation of the exact type of situation presented by the case at bar, which the Court fortunately was able to describe as "rare" (p. 539):

> Of course where acts of contempt are palpably aggravated by a personal attack

[18] *Schmidt* v. *United States*, 115 F. 2d 394 (C. A. 6), relied on by petitioners, involved contempt outside the presence of the court.

> upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed.

Although petitioners assert that Rule 42 of the Federal Rules of Criminal Procedure independently supports their contention, that Rule, and the statute from which it was derived, confirm the well-understood principle that contempt in the presence of the court, even when involving a personal attack upon the judge, is punishable by him. Rule 42 (b), entitled "Disposition Upon Notice and Hearing" contains as its sixth sentence:

> If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent.

But the first sentence of the same subdivision declares that:

> A criminal contempt *except as provided in subdivision (a) of this rule* shall be prosecuted on notice. [Italics supplied.]

Subdivision (a) relates to contempts seen or heard by the judge and "committed in the actual presence of the court." We think it clear that the exception clause at the beginning of subdivision (b) applies to all of that subdivision, including the sixth sentence, as Judge Frank declared (3 R. 94 n).

If there were any doubt as to this, it would be resolved by the Notes to Rule 42. The Note to subdivision (a) states that:

> This rule is substantially a restatement of existing law, *Ex parte Terry,* 128 U. S. 289; *Cooke* v. *United States,* 267 U. S. 517, 534.

The Note to the sixth sentence of subdivision (b) states that that provision

> is based, in part, on 29 U. S. C. 112, * * * and the observations of Chief Justice Taft in *Cooke* v. *United States,* 267 U. S. 517, 539.

Section 112 of 29 U. S. C. (§12 of the Norris-LaGuardia Act, 47 Stat. 73)[10] provided that a defendant in a contempt proceeding which "arises from an attack upon the character or conduct of such judge" may demand another judge "if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice." This obviously meant that where the contempt was in the presence of the court the judge was not expected to disqualify himself even if his "character or conduct" were under attack.

Petitioners' argument that a judge may not punish a personal attack committed in a court room would mean that the exceptions contained

[10] Section 112 was repealed in 62 Stat. 862, 866 (1948), since it had been incorporated in and superseded by Rule 42. See 29 USCA (pocket part) 112.

in § 112 and Rule 42 were both unconstitutional.[20] But the *Cooke* case, upon which the rule was predicated, demonstrates that the provision in both statute and rule for substitution of a new judge in out-of-court contempts, was approved as a wise and fair rule of judicial administration, going beyond the requirements of the Constitution.

Petitioners also rely (pp 39–40) on their repeated allegations, before and during the course of the trial in the *Dennis* case, that Judge Medina was biased. The insufficiency of the affidavit of prejudice was established in *Foster* v. *Medina*, 170 F. 2d 632 (C. A. 2), certiorari denied, 335 U. S. 909. The charges of misconduct and bias in the trial were discussed at length and rejected by the Court of Appeals in the *Dennis* case, 183 F. 2d 201, 225–226, affirmed without consideration of this point, 341 U. S. 494. The Court is respectfully referred to that opinion, of which we shall quote only the conclusion on this feature of this case (183 F. 2d 201, at 226):

> Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trials need a firm hand as much as a constant determination to give each one his due. The record discloses a judge, sorely tried for many months of turmoil,

[20] In the court below, according to Judge Frank, "the validity of that statute or of that Rule is not challenged here by anyone" (3 R. 93).

constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess. So much for the charge of hectoring counsel and unduly limiting them in the presentation of their defense. As for any disposition in any other ways to lean towards the side of the prosecution, we cannot find it in the record; if it existed it must have been in tone or bearing which print does not preserve; for, as we shall show, his charges and his rulings were, if anything, too favorable to the defense.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PAUL L. ROSS,
MARTIN POPPER,
Counsel for petitioners.

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SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

THE UNITED STATES OF AMERICA

MOTION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis respectfully move this Court for a rehearing of the order made herein on June 4, 1951 denying the petition herein for a writ of certiorari to the Court of Appeals for the Second Circuit to review its judgment in this case.

Statement

On July 14, 1950 there was filed in this Court a petition for writ of certiorari to the Court of Appeals for the Second Circuit to review its judgment in this case.

The following eight questions were presented by said petition:

1. Whether the summary conviction and sentencing of petitioners for criminal contempt, without notice, hearing, or other opportunity to answer or defend, were consistent with due process and within the power of the trial judge where a substantial time had elapsed since the occurrence of the alleged contemptuous incidents and the trial in which they occurred had been concluded.

2. Whether the trial judge could lawfully convict and punish petitioners without notice or hearing after the conclusion of a nine-months trial on the basis of episodes combed from the record of the trial and endowed in the contempt certificate with a quality and significance which the trial judge did not ascribe to them at the time of their occurrence.

3. Whether, under the circumstances stated in 1 and 2, the trial judge could lawfully convict and punish petitioners for acts considered to be disrespectful to and critical of him.

4. Whether the trial judge could so convict and punish petitioners where he found that they had agreed to engage in conduct intended to impair his health and where he had expressed the belief that they were his personal enemies ready to attack him physically and seeking to discredit him as a judge.

5. Whether it was erroneous for the Court of Appeals to affirm the convictions and sentences on the basis of par-

ticular acts set forth in Specifications II through XL, when the actual basis for the convictions and sentences was the trial judge's erroneous finding of a conspiracy, which the Court of Appeals reversed.

6. Whether the contempt certificate violates Rule 42 (a) of the Rules of Criminal Procedure by incorporating by reference the entire record in the trial of *United States v. Dennis, et al.*

7. Whether the record supports the convictions and sentences imposed on petitioners.

8. Whether under all the circumstances the punishments imposed are excessive.

On June 4, 1951 this Court, by a majority of the Justices, made an order denying the aforementioned petition. Justices Black and Douglas declared that they were in favor of granting the petition.

Jurisdiction of This Court

This motion for rehearing is made pursuant to Rule 33 of the Rules of the Supreme Court of the United States as amended on October 13, 1947.

The grounds on which this motion is made is that there are substantial grounds available to petitioners for the granting of the petition which were not previously presented.

Reasons for Granting the Motion and Petition

1. Petitioners are innocent of the alleged contempts of which they were convicted.

The nature and quality of the conduct of the petitioners are not adequately revealed and cannot be determined from the face of the contempt certificate made by the trial judge

(1 R 17-73).[1] The convictions which the Court of Appeals affirmed are all based on colloquies between the trial judge and the various petitioners. A proper appraisal of these colloquies and a determination of whether or not they constitute contempt can only be made when due and proper regard is had for the relevant context in which they appear. When so regarded, it becomes clear that none of the items cited in the contempt certificate and affirmed by the Court of Appeals constitutes a punishable contempt.

The time available to the petitioners for the filing of this motion does not permit of the preparation and printing of an original detailed analysis of each of the specifications in the contempt certificate. To support their contention that they are innocent of the contempts of which they have been convicted, petitioners are, therefore, submitting herewith as an exhibit, a true copy of a brief submitted by petitioners Sacher and Isserman to Hon. Carroll C. Hincks, United States District Judge for the District of Connecticut, in disciplinary proceedings instituted against said petitioners, which brief contains, among other things, an analysis and discussion of all but two of the Specifications contained in the contempt certificate, namely Specifications XX and XXI, which were not cited in said disciplinary proceedings. Although said brief is, in the main, directed to the question of the fitness of petitioners Sacher and Isserman to remain members of the bar of the United States District Court for the Southern District of New York, the analysis and discussion therein of each of the specifications in the contempt certificate show that the question of the innocence of all of the petitioners herein is of such sub-

---

[1] The record in this case includes the record of the trial in *United States* v. *Dennis, et al.*, D.C. S.D.N.Y., No. C 128-87. We use "D.R." to refer to the *Dennis* record, and "R." to refer to other portions of the record in this case. Record references are preceded by a numeral indicating the volume cited.

stantiality as, in our respectful view, to require review by this Court.

The following table shows the volume and pages of the aforementioned brief at which each Specification affirmed by the Court of Appeals is discussed, together with the pertinent portions of the *Dennis* record which constitute the context in which each specification is to be read:

Specification	Brief Vol.	Brief Page	Dennis Record Vol.	Dennis Record Page
II	II	30–33	1	376–385
III	IV	A20–A22	2	928–934
IV	IV	A13–A19	2	988–1038
V	II	64–70	2	1047–61
VI	II	178–186	2	1083–1092
VII	III	375–381	2	1132–1142
VIII	II	12–17	2	1657–71
IX	IV	A46–49	3	2079–2106
X	IV	A50–52	3	2383–2385
XI	IV	A53	3	2403–2404
XII	III	382–384	3	2525–2529
XIII	IV	139–141	5	3933–3945
XIV	II	107–116	5	4029–60
XVI	II	49–54	6	4787–89
XVII	IV	A187–189	6	4804–06
XIX	II	55–58	7	4961–70
XX	Not treated			
XXI	Not treated			
XXII	II	204–209	8	6250–6280
XXIII	II	135	8	6401–02
XXIV	IV	A103	8	6520–21
XXV	II	122–123	9	6554–6565
XXVI	IV	A59–69	9	6760–61
XXVII	III	385–394	9	6833–6853
XXVIII	II	62–63	9	6936–7
XXIX	II	147–151	8	6400–09
			9	7085–87
XXX	II	152–3	10	8045
XXXI	II	248–50	12	9403–05
	III	351–355	12	9365–9377
XXXII	III	356–372	12	9508–9541
XXXIII	III	319	12	9731
XXXIV	IV	A66	13	9886–7
XXXV	IV	A124	14	10748
XXXVI	II	268–69	14	10851–56
XXXVII	II	97–98	14	11212–16
XXXVIII	IV	A67–71	15	11417–23
XXXIX	II	169–172	15	11432–33

The petition for the issuance of a writ of certiorari herein included among the questions presented that of whether the record supported the convictions and sentences imposed

on petitioners. But the innocence of the petitioners was neither argued or documented therein because the convictions and punishments of petitioners, imposed as they were, without notice or opportunity to be heard long after the occurrence of all of the alleged contempts, appeared to be in such conflict with the prior decisions of this Court in the *Terry, Cooke, Michael* and *Oliver* cases, as to lead to the confident belief that certiorari would be granted on the authority of those cases.

2. A second substantial ground available to the petitioners herein which was not presented by the petition for certiorari is the following:

The contempt certificate clearly shows that the trial judge's conviction and punishment of the petitioners rested, in part, on his belief and finding that the petitioners had entered into a conspiracy to impair his health. To the extent that the trial judge acted on such belief and finding, he was clearly acting as a judge in his own cause; and his personal interest therein was such as to render any judgment he might make devoid of due process.

The trial judge declared as follows in the contempt certificate (1 R. 17):

> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. *Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into a cold and calculating manner, to do and say these things for the purpose of:* (1) causing such delay and confusion as to make it impos-

sible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) *impairing my health so that the trial could not continue.*" (Italics supplied.)

Surely, it requires no citation of authority to support the proposition that, under our jurisprudence, no judge can, consistently with the requirements of due process, sit in judgment of and mete out punishment to any person or persons accused of inflicting or conspiring to inflict personal injury on the judge. The summary contempt power is no exception to this requirement of due process. That power may be exercised only to vindicate the dignity and authority of the court as an institution. When a judge exercises the power to that end he may be presumed to have acted with the impartiality and disinterestedness essential to due process. Where, as in the instant case, it is apparent from the judge's declarations in the contempt certificate that an alleged conspiracy to inflict personal injury on him was an element in his determination of the guilt and punishment of the petitioners, his decision can no longer be said to have been made solely for the vindication of the authority and dignity of the Court as an institution nor can it be said to be possessed of that impartiality and disinterestedness which due process requires.

When the contempt certificate herein is read and construed in the light of long-established canons of construction usually applied to written instruments, including judgments, it is clear that the trial judge adjudged the petitioners guilty of and punished them for the alleged contempts attributed to them because of his finding of a conspiracy which included as one of its integral purposes the impairment of his health. In his dissenting opinion in the Court of Appeals, Judge Clark said (182 F. 2d 416, 464):

"There are not only the practical difficulties of the judge's own statement that he was punishing for the

conspiracy rather than for acts which might well be considered as due to the heat of trial, and of making sense out of his distribution of penalties, except upon his own rationale of conspiracy."

And in 60 Yale Law Journal 1, 10, Professors Harper and Haber, referring to the preamble of the contempt certificate, from which we have above quoted, write as follows:

> "These portions of the preamble seem to indicate that conspiracy was the gist of the contempt of which the defendants were declared guilty under the entire certificate. An actual evil purpose—i.e., in addition to the mere voluntary doing of the overt acts—which is, with some notable exceptions, held essential to the crime of conspiracy; is here explicitly made an element of the crime. The agreement is said to have been 'deliberately entered into [by the defendants] in a cold and calculating manner' for a series of corrupt and evil purposes."

It requires a credulity that is characteristic neither of the American bar nor of the American people, to believe that a judge who solemnly declared, that the petitioners herein had entered into a conspiracy to impair his health, was not notivated, in part at least, by that consideration in determining their guilt and fixing their punishment. For never in America's history have sentences so severe as those imposed upon the petitioners been imposed on lawyers for courtroom conduct.

In *Tumey* v. *Ohio*, 273 U.S. 510 this Court reversed a judgment fining the plaintiff-in-error $100 on the ground that he had been deprived of due process of law because the mayor of the village, who tried him, had received the sum of $12.00 for his fees and costs. At page 532 the Court said:

> "There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process

> of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

Who will say that prison sentences, ranging from 1 to 6 months, imposed on American lawyers by a judge who believed them to be engaged in a conspiracy to do him personal injury are more in accord with the requirements of due process than is a $100 fine imposed by a judge confronted with the prospect of receiving $12 in fees and costs upon imposing such fine?

The petitioners maintain that they are innocent of wrongdoing. But even if it could be said, upon a fair, impartial and dispassionate examination of the record, that their guilt was established, the sentences imposed on them would have to be held to have been imposed without due process because of the trial judge's personal interest in the redress of and the exaction of retribution for what he conceived to be a conspiracy whose purposes included the impairment of his health. For as was said in the *Tumey* case at page 535:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and therefore *that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment.* The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge." (Italics supplied)

The action of the trial judge cannot be justified on any theory of necessity. At the time he punished petitioners

the trial had been completed and the verdict of the jury returned. There was, therefore, no reason why the matter could not be assigned to another judge of the Southern District of New York who would be free to act in accordance with all requirements of due process.

In *Cooke* v. *United States*, 267 U.S. 517, 539 Chief Justice Taft, writing for a unanimous court, referred with approval to the following views of the Circuit Court of Appeals in *Toledo Newspaper Co.* v. *United States*, 237 Fed. 986, 988:

> "* * * it is of the greatest importance that contempt proceedings be put as far as possible beyond the reach of even unjust adverse criticism * * *"

Despite the repressive atmosphere that hangs over contemporary America, reasoned criticism has already been made of the conviction and punishment of these petitioners. Reference has already been made to the article of Professors Harper and Haber in 60 Yale Law Journal 1. An article in the Stanford Law Review of July 1950, 2 Stanford Law Review 763, referring to the decision of the Court of Appeals, declares at page 769:

> "The attitude of the majority in the *Sacher* case is disturbing. The great dangers inherent in summary contempt have always been recognized; it is a tribute to our judiciary that the power has generally been exercised with restraint. Case after case warns that the power must vigilantly be confined to the narrow area in which it is necessary. The vigilance should not be relaxed, particularly not in these times, when members of political minorities appear more and more often in the defendant's docket in widely publicized and heated trials, and when it is more essential than ever to keep our court procedures scrupulously fair. Regardless of how much Sacher and his fellow lawyers may have corrupted the administration of justice, there can be no justification for punishing them in a needlessly arbitrary manner. Summary contempt should be exer-

cised only when the judicial process cannot be protected by ordinary criminal procedure."

And in 99 University of Pennsylvania Law Review 540, a note on the instant case, as decided in the Court of Appeals, declares at page 543:

> "* * * it is in just such a case as this that the personality of the judge is likely to be under the severest strain and the temptation to arbitrary action the greatest. For this reason the instant court has approved an extension of arbitrary power which is neither doctrinally nor practically necessary, and which is open to dangerous abuse."

It is respectfully submitted that in view of what is above set forth, this case presents a classic instance for the exercise by this Court of that supervision of the administration of criminal justice in the Federal courts of which it spoke in the following terms in *McNabb* v. *United States*, 318 U.S. 332, 340:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' *Herbert* v. *Louisiana*, 272 U.S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

Conclusion

A rehearing of the order denying the petition for writ of certiorari should be granted and on such rehearing the writ

of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

PAUL L. ROSS,
MARTIN POPPER,
150 Broadway, New York, N. Y.
by MARTIN POPPER

The undersigned counsel for the petitioners herein hereby certify that the foregoing petition is presented in good faith and not for delay, and said petition is restricted to the grounds above specified.

Dated: New York, N. Y., June 15th, 1951.

PAUL L. ROSS,
MARTIN POPPER

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Supreme Court of the United States

OCTOBER TERM—1950

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HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE

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Supreme Court of the United States

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No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE

To the Supreme Court of the United States:

Petitioners pray that this Court grant rehearing of its decision of March 10, 1952 affirming the judgment below.

Reasons for Granting Rehearing

1. The majority opinion evaluates petitioners' conduct and its "actual effect" upon the trial reviewed in *Dennis* v. *United States*, 341 U. S. 494. It thereby follows the Government's approach objected to by petitioners upon oral argument. For this Court limited certiorari to the procedural issue (342 U. S. 858), and hence petitioners were precluded from addressing themselves to the merits. This limitation was of course an unreal one,[1] but petitioners

[1] The absence of a hearing on the merits here as well as below necessarily causes judicial error. This Court believed that the characteristics of "the behavior punished" (p. 3, Jackson, J.) were "relevant to the questions of law." One such characteristic, it said, was that the acts took place "in the presence of the jury." Actually every criticized act of petitioner McCabe occurred outside the jury's presence. This illustrates how judgment without trial and a limited review combine to hide the facts.

were bound by it. Accordingly, it is unfair for this Court to decide the narrow question for review upon a broad evaluation of conduct which its own order barred petitioners from discussing.

2. The injury to petitioners is compounded by the Court's reliance on the views of petitioners' conduct reflected in the Court of Appeals' decision in the *Dennis* case, 183 F. 2d 201, 225 in which this Court denied review of the facts, 340 U. S. 863. In that case the appellate court decided that the conduct of the judge did not deprive the defendants of a fair trial. This is very different from a finding that counsel were guilty of criminal contempt. The majority opinion treats these factual matters as relevant to the exercise of the trial judge's power. Accordingly, petitioners should have been heard on the facts by this Court.

3. The Court agrees that Rule 42 was intended to make explicit the prevailing usages at law authorizing punishment of contempts. But it disregards its many prior decisions constituting and discussing the prevailing practice. Its reason for this divergence from accepted canons of statutory construction is that "Cases prior to it grew out of facts so distinguishing that their decisions are of little value as precedents" (p. 6, Jackson, J.).

However distinctive the facts, the rule of law enunciated in those cases is clear and fully applicable to this case. The majority opinion, content with a footnote citation, does not discuss the principles laid down in *Ex parte Terry*, 128 U. S. 289, and *Cooke* v. *U. S.*, 267 U. S. 517, 534—the very cases referred to in the Notes of this Court's Advisory Committee on Rules of Criminal Procedure. The weight given to the Committee's Notes has been recognized by Chief Justice Stone in *Mississippi Pub. Corp*, v. *Murphree*, 326 U. S. 438, 444, and Mr. Justice Jackson in *United States* v. *Smith*, 331 U. S. 469, 473-474. These are the principles:

(1) Summary contempt power may be exercised only where necessary for the court's "right of self-preservation," *Marshall* v. *Gordon*, 243 U. S. 521, 541; (2) such necessity exists only where it is "the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 6 Wheat. 204, 231; (3) where necessity does not compel this summary action, the requirements of due process, including a hearing, must be met. Such too was the view of this Court, recently expressed without dissent on this point, *In re Oliver*, 333 U. S. 257, 274-275.

These principles have been applied in three cases not noted in our original brief:[2]

In re Foote, 76 Cal. 543;
People v. *Burt*, 257 Ill. App. 60, 61;
In re Pollard, L. R. 2 P. C. 106, 120.

In each it was held that summary action could not be taken after the event. In the *Burt* opinion, the Court concluded: "One cannot be deprived of his liberty in this country without due process of law." The *Pollard* case was in many ways similar to this one. A barrister in Hong Kong was censured and requested to apologize for repeated misconduct on one day. Several days later the trial judge declared him guilty of contempt and punished him. The judge thus explained his delay in taking action: "I feared that anger might be present in my mind" (*id.* 114) (*cf.* Mr. Justice Jackson's argument, *infra*). It was held that he could not thus punish the barrister "unless the specific offense charged against him be distinctly stated and an opportunity of answering it given to him." (*id.* 120).

Had these precedents and principles been followed here, the judgment of conviction would have been reversed.

4. The Court states that delay in adjudication without hearing is beneficial to the petitioners because it permits a

[2] The first two cases were cited upon oral argument; the third has just come to our attention.

judgment "well-considered" rather than the result of "irritation" (p. 9, Jackson, J.). This argument assumes a power to act summarily when the emergency which alone justifies that extraordinary power no longer exists. Nor does the length of *ex parte* deliberation, as such, make for due process. The Fifth Amendment requires something more: the right to offer evidence, explanation and argument at a hearing. Only when these rights are granted is the passage of time meaningful in terms of due process.

5. Against the arguments of precedent and equitable treatment, the Court justifies the deferment of summary action on the ground that the trial judge possibly feared that it would "prejudice his client" before the jury (p. 8, Jackson, J.). That this was not a consideration in the present case appears from the Appendix to Mr. Justice Frankfurter's opinion. The jury was repeatedly apprised by the trial judge of his hostility toward defense counsel.

There is further evidence that this was not a factor. Several of the defendants on trial were summarily convicted of contempt during its progress (*U. S.* v. *Gates, et al.*, 176 F. 2d 78; *U. S.* v. *Hall*, 176 F. 2d 163; *U. S.* v. *Green*, 176 F. 2d 169). Fear of prejudicing them did not deter the trial judge from summary punishment. Only his judgment of such necessity could have justified his taking such action. His failure to act against petitioners until much later was a recognition of the absence of that necessity which alone justifies the denial of hearing.

6. The three dissenting opinions contain, albeit with circumspection, the most critical comments upon a trial Judge's behavior ever employed by this Court. The majority opinion is silent upon this question, perhaps from a sense of delicacy which must affect one judge's discussion of another's conduct. But when the effect of avoidance is to imprison lawyers and ruin their careers, this Court may not turn away.

It is not necessary to cite reference in support of Mr. Justice Douglas's photographically accurate conception of

a judge who "used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted." What is material and relevant and cause for reversal is the existence of the extreme personal interest of the trial judge in the punishment of the lawyers who, in his view, to quote Mr. Justice Douglas's alternative conception, "conspired to drive a judge from the bench."

No member of this Court suggests that the Fifth and Sixth Amendments permit Rule 42, unlike all other law, to be administered by a partisan judge. Elementary principles of fair play forbid that suggestion. Instead, Mr. Justice Jackson states that virtually "any contempt of a court committed in the presence of a judge during the trial will be an offense against his dignity and authority" (p. 109). Surely this is an oversimplification which would disregard the existence of that special type of case represented here and recognized by Mr. Chief Justice Taft in the *Cooke* case:

> "The case before us is one in which the issues between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows" (267 U. S. at 539).[3]

There is a difference between disobeying an order of the trial judge and attempting to undermine his health. A judge who punctuates a trial with observations[4] about his need for police protection, with complaints that he "must suffer the excoriations and accusations of counsel," who refers to them as "You Communists," and describes one as "impudent" and another as a liar "caught red-

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[3] It was the view of the Chief Justice that for this reason the contempt trial should be before an impartial judge. The Advisory Committee's notes show that this is still the law.

[4] Mr. Justice Frankfurter's opinion herein, Appendix, pp. 31, 37, 49, 57, 58.

handed" does not meet this Court's standard that a judge must have "no interest other than the pursuit of justice" (*Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275).

7. The lawyer petitioners strongly urge reconsideration for reasons affecting both their individual careers at the Bar and the administration of justice. Without a hearing they have been convicted of crime and sentenced to prison. These convictions have instigated disciplinary proceedings against several of them. In at least one case, that of petitioner Isserman, the New Jersey Supreme Court proposes now to disbar him without any hearing. It seeks to rely solely upon this Court's affirmance of the contempt conviction on the theory that it precludes any examination of the facts. Thus, one adjudication made without hearing is the foundation for another adjudication without hearing. How swiftly does one denial of due process lead to another!

The result is that without opportunity to defend themselves, below or in this Court, these petitioners are faced with an unending train of consequences: prison sentences, personal humiliation, economic ruin and the end of their long and honorable professional lives.

The deleterious effect of such summary action upon the representation of unpopular minority groups is denied by the majority opinion. We ask the Court to pause one moment before it gives finality to a proposition so contrary to the realities of today's political trials. A court which has had before it such cases as *Dennis, supra, American Communications Association* v. *Douds*, 339 U. S. 382, and a host of others, is surely not unaware of what is transpiring today in the United States. It must know that throughout the United States judges, even in non-political cases, have reminded lawyers of Judge Medina's action and have tightened the judicial reins. A lawyer will not be afraid to assert his client's interests with the Bar's traditional vigor, when he knows that he cannot be summarily punished at the end of the trial for something that may have occurred, as here, days, weeks and even months earlier.

Under this decision, no lawyer is safe because any sharp colloquy may ultimately be deemed contempt and cause for punishment without hearing. As for cases involving political issues—the reluctance of lawyers to represent defendants has become a national scandal. This decision assures a further shrinkage in the small number of lawyers ready to brave economic injury and other business and community pressures.

Just as lawyers have particular obligations to the courts they serve, so have the courts a special responsibility to protect their lawyer-officers. The majority of this Court, however convinced of the soundness of its own views, cannot but recognize the weight of the considerations urged in the three dissenting opinions. It must know that it has made a trial conducted in a tense "political and emotional atmosphere"[5] the occasion for "a considerable departure from orthodox procedure."[6] Rehearing, though frequently sought, is not often granted. But the uniqueness and importance of the issues presented, the effect of the affirmance upon members of the Bar, and the very serious doubts that must arise from the thoughtful dissents as well as from the foregoing arguments, justify and require a rehearing of this case.

Respectfully submitted,

PAUL L. ROSS,
MARTIN POPPER,
Counsel for Petitioners,
160 Broadway,
New York, New York.

LEONARD B. BOUDIN,
of Counsel,

Dated: March 24, 1952.

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[5] p. 3, Frankfurter, J.

[6] *Summary Contempt: A Sword or a Shield*, 2 Stanford Law Review 763; see also 99 Univ. of Penna. Law Review (1951) 540-543.

Certificate of Counsel

I, PAUL L. ROSS, do hereby certify that I am counsel for the petitioners herein, and that this petition for rehearing is presented in good faith and not for delay.

March 24, 1952.

PAUL L. ROSS.

MOTION FOR STAY OF MANDATE

The petitioners, through the undersigned, their counsel, hereby move this Court for an order staying the mandate until the petition for rehearing filed herewith shall have been considered and determined by this Court, upon the following grounds:

1. The petitioners Crockett, Gladstein, Isserman, McCabe and Sacher are members of the Bar in various jurisdictions. With the exception of the petitioner Isserman, who is presently under suspension, they are actively engaged in litigation and other legal matters on behalf of their clients. For this reason, they would suffer peculiar and unusual hardship if they were compelled to serve the sentences before the petition for rehearing is finally disposed of by this Court.

2. Unless the order for stay of mandate is granted, the petitioners may be compelled to serve a substantial portion of their sentences before the action of this Court is final.

3. In the event of favorable action by this Court, if there is no stay of the mandate, the petitioners, as members of the Bar, would have suffered special and peculiar humiliation, with consequent adverse effect upon their pro-

fessional standing and relations with their clients, whose interests would have been needlessly jeopardized.

4. The dissenting opinions and the arguments set forth in the petition for rehearing raise very serious doubts as to the correctness of this Court's decision and afford substantial grounds for rehearing by this Court.

PAUL L. ROSS,
Counsel for Petitioners.

Dated: March 24, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 201

HARRY SACHER, et al.,
Petitioners,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

ROBERT J. SILBERSTEIN,
40 Exchange Place, N. Y. C.,
Counsel for National Lawyers Guild.

Supreme Court of the United States

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The National Lawyers Guild respectfully moves this Court, pursuant to Rule 27, paragraph 9, of the Rules of this Court, for leave to file a brief in this case as amicus curiae.[1]

[1] The Solicitor General has previously informed the Guild that since the 1949 revision of Rule 27 of the Court, it has been his uniform policy not to consent to the filing of briefs amicus curiae. For this reason, the Guild did not request the consent of the parties to the filing of a brief amicus curiae.

The interest of the Guild in this case, and its reasons for asking leave to file a brief amicus curiae, are set forth below.

The Guild, as a national bar association, has as a primary objective the promotion and advancement of the administration of justice. In common with other bar associations we have always been profoundly concerned with the defense of the civil rights guaranteed by the Constitution. It is also our function to share with other bar associations the duty of helping to preserve and continue the great tradition of the American Bar. For these reasons, we are profoundly interested in the important issues in this case, which have aroused serious concern among lawyers throughout the country.

The basis of this motion is that there exist facts relevant to the disposition of the instant petition for rehearing which have not been presented to this Court by the parties. These facts concern issues which directly affect the interests and responsibilities of the Bar as a whole, and which far transcend the immediate interests of the petitioners.

The contempt convictions and sentences imposed on the petitioners herein, and the petition for rehearing now before this Court, arise out of the use of the summary contempt power by the trial judge in a case involving leaders of the Communist Party—a case surcharged with sharp emotional reactions. The task of defense counsel in such cases is concededly a difficult one and it is of the utmost importance that there be no confusion respecting either the responsibilities of the members of the bar or of the powers of the trial court. Confusion now exists in both these areas as a result of the three separate opinions and the divided decision rendered by the Court of Appeals below; and this confusion can only be dissipated by a clear pronouncement from this Court.

The importance of the granting of the petition for rehearing by this Court and upon such rehearing, the granting of certiorari in this case, appears from the following facts, which we wish to bring to the attention of the Court—

It has become most difficult for unpopular minority groups to secure counsel for their defense in serious criminal prosecutions now pending. This difficulty, and the "dilemma" thereby created, was recognized in the dissenting opinion of Circuit Judge Clark below. He stated (182 Fed. (2d) 416, 466):

> "It is no secret that the difficulty of securing counsel to defend adequately unpopular minority groups is great, and indeed acute in non-metropolitan districts. On the other hand, the insistence upon counsel as a part of the constitutional element of a fair trial is more pronounced, more precisely stated, each judicial term. There may be approaching the dilemma that trial cannot be had without counsel, and yet none can be found for the burdensome job."

Judge Clark is not alone in his apprehensions. A group of 17 distinguished Americans, including Prof. Albert Einstein, Dr. Thomas Mann, Prof. Thomas Emerson (President of the National Lawyers Guild), Prof. Robert Lynd and others, in an amicus statement submitted to the Court of Appeals below, expressed their alarm at the threat to the rights of fair trial and effective assistance of counsel, resulting from the contempt convictions in this case. These distinguished Americans stated in part:

> "Today lawyers in various parts of the country who dare to defend clients representing minority views are suffering punishment which strikes at their professional lives and their freedom."

Specific instances which show that these concerns are not groundless are the following:

(a) 17 Communist leaders arrested in the Southern District of New York on June 20, 1951, on Smith Act indictments, advised the Court on July 16, 1951, that they had been unable to secure counsel to represent them. Affidavits were presented to the Court showing that requests made to a large number of prominent members of the Bar to represent the defendants, on a fee basis, had been declined. A

number of the attorneys so solicited frankly advised defendants that although interested in their cases they could not risk disfavor of their clients and the public by appearing in their case. The officers of the Civil Rights Committees of the major bar associations, who were also solicited, were unable to assist the defendants in their quest for counsel.[2] District Judge Sylvester Ryan was evidently compelled to take the unprecedented step of formally calling upon the 4 major bar associations in New York City (the Association of the Bar, the New York County Lawyers Association, the New York Chapter of the National Guild and the Brooklyn Trial Lawyers Association) to submit names of attorneys whom they felt would agree to represent these defendants. Although there are some 20,000 lawyers in the Southern District of New York,[3] most of whom belong to one of these four bar associations, all four associations were only able to submit a total aggregate list of ten names of lawyers who would handle this case.[4] To date only one trial lawyer chosen from this list of ten has been retained to represent one of these 17 defendants, although their trial is scheduled to commence shortly. One additional lawyer from the list, Thomas I. Emerson, was retained to argue preliminary motions for certain of the defendants.

(b) The motion of November 17, 1950, by petitioners in *U. S.* v. *Dennis* in this Court, for a postponement of the arguments of their appeal, presents similar facts. The *Dennis* petitioners advised the Court that they desired to have other counsel (in addition to the petitioners herein) argue their appeal, but were entirely unsuccessful in ob-

[2] These facts are set forth in affidavits filed on July 16, 1951, in *U. S.* v. *Flynn, et al.*, S. D. N. Y., 1951 Cr.

[3] Congressional Record, Feb. 14, 1940, at pp. 2253, 2277, 2280; N. Y. State Bar Ass'n Bull., Feb. 1950, p. 212.

[4] N. Y. Times, August 9, 1951, p. 1, setting forth the names of the 10 attorneys submitted by the four N. Y. C. bar associations.

taining such counsel from the bar in this country and were therefore required to solicit counsel abroad.[5]

The difficulties in obtaining counsel for defendants associated with unpopular causes became sufficiently acute to have led President Truman in a recent message to call it to attention of the 74th Annual Meeting of the American Bar Association.[6]

There now exist numerous pressures upon the members of the bar which produce this trend, which directly conflicts with the finest traditions of the Bar.[7]

Our courts share with the Bar, the responsibility for reversing this trend—for responding to this plea recently made in a noted legal essay: "let us defend to the utmost that great doctrine that every man, every cause, every faith, shall receive adequate and just advocacy at our hands. If we surrender this we lose one of the greatest principles on which we built this nation. * * *"[8]

To the extent that the undefined limits and possible misuse of the summary contempt power by trial courts has contributed to this fear of lawyers to represent members of unpopular minorities, it becomes important that the limits of this power be expressly fixed and not left in a state of unclarity. The proper scope and exercise of the summary contempt power, and the need for its delineation, is directly at issue, in the petition for rehearing now before this Court.

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[5] *U. S.* v. *Dennis*, 340 U. S. 887.

[6] Letter of Pres. Truman dated September 1, 1951, to Criminal Law Section of American Bar Association, quoted in full in the New York Times, Sept. 19, 1951, at p. 10.

[7] Professor Cushman has observed that that tradition of the American Bar in defending civil liberties, and the rights of unpopular minorities "stretches all the way from James Otis defending two Boston merchants against tyrannical Writs of Assistance in 1761 to Wendell Willkie defending the Communist, William Schneiderman in 1943" (R. E. Cushman, Civil Liberty and Public Opinion in Safeguarding Civil Liberties Today, 1945, at p. 105).

[8] E. Wilkerson, *The Proper Place of the Lawyer in Society*, 36 American Bar Ass'n Journal, pp. 289, 347 (1950), at p. 348.

We do not assert that the fear of punishment for contempt is the only factor responsible for the trend we have described. The effect of the existing hysteria on their practice and standing, has been cited by some prominent attorneys, as their reason for declining to represent unpopular defendants.[9]

The threat of physical violence may have played a role. Mr. John Poole, a member of the Mississippi bar, who represented the Negro Willie McGee in the Mississippi state court, when he was tried on a charge of rape, was physically attacked by a group of men as he was boarding a plane for Washington, D. C., in an apparent effort to prevent him from presenting an application for a stay of execution to this Court.[10] Mr. Poole subsequently resigned from the case, and threatened state disbarment proceedings against him were dropped.

Most recently the qualifications of Senator Henning of Missouri to sit on a Senate sub-committee were challenged on the ground that his law firm represents the St. Louis Post-Dispatch, and his law partner Mr. John Raeburn Green, a confirmed anti-communist, filed a petition for rehearing (without fee) for one of the petitioners in the *Dennis* case.[11]

But one cannot say that the fear of the action of the courts has not been a significant contributing factor. On

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[9] In *U. S. v. Dennis*, 340 U. S. 887, the defendants in their motion of November 17, 1950, advised this Court that 24 "leaders of the American Bar", separately solicited, all declined to participate in the argument of their appeal to this Court—some on the express ground that such participation would injure their professional standing and practice. Similar statements are made in a letter from Miss E. G. Flynn, dated September 18, 1951, to Mr. Cody Fowler, President of the American Bar Assn, respecting the efforts of the defendants in *U. S. v. Flynn*, Crim.: S. D. N. Y., 1951, to obtain counsel to represent them. (N. Y. Daily Compass, Sept. 19, 1951, p. 5).

[10] New York Times, July 23, 1950, p. 60; July 27, 1950, p. 48; N. Y. Daily Compass, July 23-28, 1950.

[11] New York Times, September 22, 1951, p. 6; September 19, 1951, p. 2.

December 16, 1949, Mr. O. John Rogge, former U. S. Assistant Attorney General, and Messrs. William Patterson and Emanuel Bloch, attorneys for six Trenton Negro youths charged with murder, were barred from further representing their clients because of the Court's disapproval of statements attributed to them regarding the conduct of the previous trial, made out of court. These attorneys had succeeded in securing a reversal of a prior murder conviction against all six defendants.[12]

A number of distinguished California trial lawyers, including the former Attorney General of California, representing the C. I. O. Fisherman's Union in an anti-trust action, were harshly and publicly censured by the United States Circuit Court on September 28, 1949 for having challenged on constitutional grounds, the methods of jury panel selection.[13] These attorneys were so publicly rebuked although the appellate court in part conceded the validity of their challenge.[13]

On October 22, 1949, just 8 days after the petitioners at bar were held in contempt by the District Judge, Mr. Vincent Hallinan, a prominent West Coast attorney, was held in contempt and sentenced to 6 months imprisonment during the first week of his defense of Harry Bridges, trade-union leader.[14]

The use or threatened use of the contempt power has not been confined to prosecutions against Communists, Negroes, trade-unionists or radicals alone; but in the recent period has generally become more widespread.[15]

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[12] New York Times, December 17, 1949, p. 1; December 18, 1949, p. 6.

[13] *Cf Local 36 of International Fisherman, C.I.O.* v. *U. S.*, 177 F. (2d) 320, at pp. 340, 341.

[14] This contempt conviction, involving somewhat different issues than the case of the petitioners at bar, was affirmed by the Ninth Circuit Court of Appeals in *U. S.* v. *Hallinan*, 182 F. (2d) 880, cert. den. 71 S. Ct. Rep. 1010.

[15] Thus in the recent abortive prosecution of 18 N. Y. C. policemen on charges of conspiracy to accept bribes, in the County Court

The great dangers inherent in the use of the summary contempt power have always been recognized.[16] The increasing use of this exceptional power, and its recent application against defense lawyers has caused widespread concern among the bar throughout the country.[17]

This Court emphasized its continuous concern with dangers inherent in the summary contempt power, particularly where exercised against an attorney, when it recently granted certiorari in the case of *Fisher* v. *Pace*.[18]

In the *Fisher* case the contempt citation arose out of the trial of a workmen's compensation case in a Texas state court, and the imposition by the trial court of a $100 fine and 3 days imprisonment for contempt.

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of Brooklyn, New York, the trial judge issued the following threat of contempt citation against one of the defense attorneys, for pressing a challenge to a juror, on the second day of the voir dire examination: "If you continue as the Communist lawyers did, I'll take action now instead of waiting till the end of the trial." (N. Y. World Telegram & Sun, Sept. 11, 1951, at pp. 1, 2).

[16] Nelles, *Summary Power to Punish for Contempt*, 31 Col. Law Rev. 956; *Anderson* v. *Dunn*, 6 Wheat. 204, 227 (1821); *in re Michael*, 326 U. S. 224, 227 (1945); *In re Oliver*, 333 U. S. 257 (1948).

[17] Harper and Haber, *Lawyer Troubles in Political Trials*, 60 Yale L. J. 1 (Jan., 1951); 99 U. of P. Law Rev. 540. A recent comment in 2 Stanford Law Rev. 769 (July, 1950) emphasizes the great danger in the use of the summary contempt power "particularly * * * in these times, when members of political minorities appear more and more often in the defendant's docket in widely publicized and heated trials * * *." For an expression of the concern of the English bar, see Whitty, *The Hallinan Case*, 14 Modern Law Review 89 (London, Jan., 1951), also noting that contempt sentences against attorneys are virtually non-existent in English courts at present.

[18] 334 U. S. 827.

The contempt adjudication in *Fisher* v. *Pace* was only sustained by a bare majority of this Court,[19] and three separate dissenting opinions were filed.[20]

When the question of the exercise of summary contempt power becomes intertwined with the other factors present in the instant case—and when the fear of contempt citation becomes a contributing factor in a trend towards the deprivation of the constitutional right of counsel to unpopular minorities—then the question of the limits of the proper scope and exercise of the contempt power of the trial court becomes an issue of transcendent importance to the bar.

That this is the situation, we have attempted to show by the facts referred to above.

In fulfillment of its duty as a bar Association, concerned with the promotion and advancement of the administration of justice, and with the protection of the civil rights guaranteed by the Constitution, the National Lawyers Guild respectfully seeks leave to file a brief, amicus curiae, in this case.

Respectfully submitted,

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40 Exchange Place, N. Y. C.,
Counsel for National Lawyers Guild.

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[19] 336 U. S. 155, affirming by a 5-4 decision the divided opinion of the Texas State Court (206 S. W. (2d) 1000) upholding the citation.

[20] 336 U. S. 155 at 163 (Dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black); id. at 166, separate dissent by Mr. Justice Murphy; id. at 168, separate dissent by Mr. Justice Rutledge.